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ABSTRACT

During calendar year 1994, the U.S. Department of Education published significant revisions to the Education Department General Administrative Regulations (EDGAR). These regulatory changes addressed the noncompeting continuation (NCC) application process for discretionary grants and cooperative agreements, the Department's implementation of the revised Office of Management and Budget (OMB) Circular A-110, and the rules for claiming reimbursement for indirect costs under the Department's grant awards. This book discusses each of these topics in detail. It contains the revisions to Parts 74, 75, 76, 77, 79, 80, 81, 82, 85 and 86 of the United States Code of Federal Regulations. Eleven tables are included. The appendix contains final regulations regarding Parts 75 and 76 that took effect on December 19, 1994. For the first time, the volume contains both a table of contents showing the location of major parts and a list of the information tables contained in the regulations, with their corresponding page numbers. A new topical index is included. (LMI)

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ED 396 453

EDUCATION DEPARTMENT GENERAL ADMINISTRATIVE REGULATIONS

34 CFR Parts 74, 75, 76, 77, 79, 80, 81, 82, 85 and 86

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EA 027 707

EDGAR

EDUCATION DEPARTMENT GENERAL ADMINISTRATIVE REGULATIONS

34 CFR Parts 74, 75, 76, 77, 79, 80, 81, 82, 85 and 86

January 1, 1995

U.S. Department of Education
Washington, DC

First Printing: January, 1995

NOTE TO THE READER

This publication by the U.S. Department of Education is an unofficial version of the Education Department General Administrative Regulations (EDGAR), codified at 34 CFR Parts 74 - 86. The publication incorporates final regulations that the Department published too late to appear in the official 1994 version of Title 34 of the *Code of Federal Regulations* issued by the Office of the Federal Register (OFR). The Department has made every effort to ensure the accuracy of the regulations contained in this unofficial version. However, the only official versions of these regulations are those published by the OFR in the *Federal Register* and the *Code of Federal Regulations*.

FOREWORD

During calendar year 1994, the Department published significant revisions to the Education Department General Administrative Regulations (EDGAR), which are composed of Parts 74-86 of Title 34 of the Code of Federal Regulations. These regulatory changes addressed the noncompeting continuation (NCC) application process for discretionary grants and cooperative agreements, the Department's implementation of the revised Office of Management and Budget (OMB) Circular A-110, and the rules for claiming reimbursement for indirect costs under the Department's grant awards. Each of these topics is discussed in further detail below.

- On June 10, 1994, the Department published final regulations in the *Federal Register* [59 FR 30258] that modified Part 75 to eliminate the requirement that recipients submit continuation applications. Instead, the due dates for performance reports required as a condition of awards will be adjusted so that the reports can be used to determine whether a recipient has met the criteria for receiving a continuation award. The regulatory changes also clarified the Department's policy for using funds that the recipient has not obligated by the end of a budget period.

  This book presents the text of this regulatory part as it now stands as a result of the June 10, 1994 regulatory notice.

- On July 6, 1994, the Department published a completely revised Part 74 of EDGAR in the *Federal Register* [59 FR 34722], which implements for the Department's recipients the requirements of the revised OMB Circular A-110, published by OMB in late 1993. The new Part 74, which is effective for discretionary grants and cooperative agreements awarded on or after October 1, 1994, incorporates the text of the revised circular almost verbatim and changes many aspects of the administrative requirements for the Department's grants and cooperative agreements awarded to institutions of higher education, hospitals, and other non-profit organizations. The new Part 74 was accompanied by changes to Part 77 to bring the definitions for certain terms into line with those contained in the new Part 74.

  The new Part 74 applies only to grants awarded on or after October 1, 1994. Since many readers of this book administer grants awarded before that date, the previous Parts 74 and 77 are published in their entireties in this book. These apply to any award to the affected class of recipients that the Department made on or before September 30, 1994.

- On November 17, 1994, the Department published in the *Federal Register* [59 FR 59578] final regulations for both direct grant programs and state-administered programs that amend Parts 75 and 76 to clarify the requirements and procedures for establishing and applying indirect cost rates under programs administered by the Department. Topics addressed by the regulations include computing and using restricted indirect cost rates in programs with a statutory supplement-not-supplant requirement, the definition of a training grant, and using indirect costs for matching or sharing costs. The regulations allow state educational agencies to approve multi-year indirect cost rates for local educational agencies and include a requirement that the eight percent training rate be applied to a *modified total direct cost base*, which is also defined in the regulations.

  Because of the effective date of these regulatory changes, they do not apply uniformly to the indirect cost rates for all Fiscal Year 1995 grant awards. Therefore, these changes are not incorporated into the texts of Parts 75 and 76. For the reader's convenience, they are shown in Appendix A, which is a reprint of the original *Federal Register* notice.

The reader's attention is called to a few enhancements to this edition of *EDGAR*. For the first time, the volume contains both a table of contents showing the location of the major parts and a list of the information tables contained in the regulations, with their associated page numbers. In addition, this edition features a newly created topical index in the back of the book to help the reader locate rapidly topics of particular interest. Finally, the whole volume has been completely reset in a new type font for enhanced ease in reading.

The staff of the Department hope that these changes will make *EDGAR* a publication of greater service and utility to the reader. Comments on these changes or any other aspect of this book are always welcome. The last page contains information about the mailing address in the Department for sending suggestions for further improvement.

NOTE: Items in the body of this book that are followed by an asterisk are shown as they were originally printed in the *Federal Register* and/or the *Code of Federal Regulations*.

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(**NOTE:** The following version of Part 74 applies only to discretionary grants and cooperative agreements awarded **on or before** September 30, 1994.)

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Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110, unless otherwise noted.

Source: 53 FR 8106, Mar. 11, 1988, unless otherwise noted.

Subpart A-General

§ 74.1 Purpose and scope of this part.

(a) This part establishes uniform requirements for the administration of ED grants and principles for determining costs applicable to activities assisted by ED grants for all grantees other than State and local governments and Indian tribal organizations.

(b) Uniform requirements for State and local governments and Indian tribal organizations are in 34 CFR part 80-Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

(c) Recipients subject to this part are also subject to 34 CFR parts 75, 76, 77, 78, and 79, to the extent applicable.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.2 Scope of subpart.

This subpart contains general rules pertaining to this part 74 (definitions, purpose and scope, applicability, and appeals) and procedures for control of deviations from the part.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.3 Definitions.

As used in this part:

Awarding party means (1) with respect to a grant, ED, and (2) with respect to a subgrant, the grantee. (See §74.4(b))

Contract means (except as used in the definitions for "grant" in this section and except where qualified by "Federal") a procurement contract under a grant and "subcontract" means a procurement subcontract under such a contract.

Cost-type contract means a contract or subcontract in which the contractor or subcontractor is paid on the basis of the costs it incurs, but the term does not include such subcontracts under a non-cost-type contract or subcontract.

ED means the U.S. Department of Education.

Expenditure report means:

(1) For nonconstruction grants, the "Financial Status Report" (or other equivalent report);

(2) For construction grants, the "Outlay Report and Request for Reimbursement for Construction Programs" (or other equivalent report). (See Subpart I of this part.)

Grant means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

Grantee means the nonprofit corporation or other legal entity to which a grant is awarded and which is accountable to the Federal Government for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the award document. For example, a grant award document may name as the grantee one school or campus of a university. In this case, the granting agency usually intends, or actually requires, that the named component assume primary or sole responsibility for administering the grant-assisted project or program. Nevertheless, the naming of a component of a legal entity as the grantee in a grant award document shall not be construed as relieving the whole legal entity from accountability to the Federal Government for the use of the funds provided. (This definition is not intended to affect the eligibility provision of grant programs in which eligibility is limited to organizations, such as State educational agencies, which may be only components of a legal entity.) The term "grantee" does not include any secondary recipients such as subgrantees, contractors, etc., who may receive funds from a grantee pursuant to a grant.

OMB means the Office of Management and Budget within the Executive Office of the President.

Recipient means grantee or subgrantee.

Terms of a grant or subgrant means all requirements of the grant or subgrant, whether in statute, regulations, the award document or elsewhere.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

[53 FR 8106, Mar. 11, 1988, as amended at 57 FR 30335, July 8, 1992]

§ 74.4 Applicability of this part.

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (3) of this section or where inconsistent with Federal statutes, regulations, or other terms of a grant, this part applies to all ED grants.

(2) With the exception of 34 CFR 74.62, which applies to Chapter 1, this part does

not apply to the programs authorized under Chapter 1 and Subchapters A through C of Chapter 2 of the Education Consolidation and Improvement Act of 1981.

(3) Unless expressly made applicable by ED, this part does not apply when the grantee is a Federal agency, foreign government or organization, international organization such as the United Nations, for profit organization, or individual.

(b) *Public institutions of higher education and hospitals.* Grants and subgrants to institutions of higher education and hospitals operated by a government shall be subject to provisions of this subpart.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.6 Deviations.

(a) Except as provided in §74.7, a deviation is any exception to this part not required by Federal statute without allowance of agency discretion. A deviation may be either:

(1) Use of any policy, procedure, form, standard, or grant term which is inconsistent with an applicable provision of this part, or

(2) Failure to use any applicable policy, procedure, form, standard, or grant term which is required by this part.

(b) In order to maintain uniformity to the greatest extent feasible, deviations shall be kept to a minimum. A deviation, whether proposed by an applicant, a recipient, or an official of ED may be authorized only when it is necessary to meet programmatic objectives, or to conserve grant funds, or when it is otherwise essential in the public interest.

(c) A deviation from this part may be made only when authorized by the Secretary.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.7 Special grant conditions.

(a) Without regard to the deviation control procedures of §74.6, special grant conditions more restrictive than those prescribed in this part 74 may be imposed as needed when ED has determined that the grantee:

(1) Is financially unstable.

(2) Has a history of poor performance, or

(3) Has a management system which does not meet the standards of this part.

(b) When special conditions are imposed under paragraph (a) of this section, the grantee will be notified in writing:

(1) Why the special conditions were imposed and

(2) What corrective action is needed. Furthermore, in accordance with OMB Circular A-110, OMB and other Federal agencies in a granting relationship with the grantee will be provided copies of the notice to the grantee.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

Subpart B-Cash Depositories

(Authority: 20 U.S.C. 3474; OMB Circular A-110)

§ 74.10 Physical segregation and eligibility.

Except as provided in §74.11, awarding parties shall not impose grant terms which:

(a) Require the recipient to use a separate bank account for the deposit of grant funds, or

(b) Establish any eligibility requirements for banks or other financial institutions in which recipients deposit grant funds.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.11 Checks-paid basis letter of credit.

A separate bank account shall be used when payments under letter of credit are made on a "checks-paid" basis. A checks-paid basis letter of credit is one under which funds are not drawn until the recipient's checks have been presented to its bank for payment. (See Subpart K for definition of "letter of credit.")

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.12 Minority-owned banks.

Consistent with the national goal of expanding opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority-owned banks. Upon request, ED will furnish a list of minority-owned banks.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

Subpart C-Bonding and Insurance

(Authority: 20 U.S.C. 3474; OMB Circular A-110)

§ 74.15 General.

In administering grants and subgrants, recipients shall observe their regular requirements and practices with respect to bonding and insurance. No additional bonding and insurance requirements, including fidelity bonds, shall be imposed by the terms of the grant or subgrant except as provided in §§74.16 through 74.18.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.16 Construction and facility improvements.

(a) *Scope of this section.* This section covers requirements for bid guarantees, performance bonds, and payment bonds when the recipient will contract for construction or facility improvement (including alterations and renovations of real property) under a grant or subgrant.

(b) *Definitions.* (1) *Bid guarantee* means a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, if its bid is accepted, execute the required contractual documents within the time specified.

(2) *Performance bond* means a bond executed in connection with a contract to secure fulfillment of all the contractor's obligations under the contract.

(3) *Payment bond* means a bond executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(c) *Bids and contracts of $100,000 or less.* The recipient shall follow its own requirements and practices relating to bid guarantees, performance bonds, and payment bonds.

(d) *Bids and contracts exceeding $100,000.* The recipient may follow its own regular policy and requirements if the Secretary has determined that the Federal Government's interest will be adequately protected. If this determination has not been made, the minimum requirements shall be as follows:

(1) A bid guarantee from each bidder equivalent to 5 percent of the bid price;

(2) A performance bond on the part of the contractor for 100 percent of the contract price; and

(3) A payment bond on the part of the contractor for 100 percent of the contract price.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.17 Fidelity bonds.

(a) ED may require a grantee to carry adequate fidelity bond coverage where the absence of coverage for the grant-supported activity is considered as creating an unacceptable risk.

(b) A fidelity bond is a bond indemnifying the recipient against losses resulting from the fraud or lack of integrity, honesty or fidelity of one or more employees, officers or other persons holding a position of trust.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.18 Source of bonds.

Any bonds required under §74.16(d)(1) through (3) or §74.17 shall be obtained from companies holding certificates of authority as acceptable sureties (31 CFR part 223). A list of these companies is published annually by the Department of the Treasury in its Circular 570.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

Subpart D-Retention and Access Requirements for Records

(Authority: 20 U.S.C. 3474; OMB Circular A-110)

§ 74.20 Applicability.

(a) Except as provided in paragraph (b) of this section, this subpart applies to all financial and programmatic records, supporting documents, statistical records and other records of recipients and of contractors and subcontractors under grants and subgrants, which are:

(1) Required to be maintained by the terms of an ED grant, or

(2) Otherwise reasonably considered as pertinent to an ED grant.

(b) This subpart does not apply to records maintained by the contractor or subcontractor for any of the following types of awards it has received under a grant or subgrant:

(1) Any contract or subcontract of $10,000 or less, or

(2) Any contract or subcontract awarded using the formal advertising method of procurement, whether or not required to be so awarded, or

(3) Any subcontract awarded under a contract or subcontract described in paragraph (b)(2) of this section.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.21 Length of retention period.

(a) Except as provided in paragraphs (b) and (c) of this section, records shall be retained for 3-years from the starting date specified in §74.22.

(b) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3 year period, the records shall be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(c) In order to avoid duplicate recordkeeping, awarding parties may make special arrangements with recipients to retain any records which are continuously needed for joint use. The awarding party will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the awarding party the 3-year retention requirement is not applicable to the recipient.

CROSS-REFERENCE: See 34 CFR 75.734-Record retention period. Section 75.734 contains record retention requirements imposed by the General Education Provisions Act.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.22 Starting date of retention period.

(a) *General.* (1) Where ED grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee submits to ED its single or last expenditure report for that period. However, if ED grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits to ED its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report to ED. If an expenditure report has been waived, the retention period starts on the day the report would have been due. "Expenditure report" is defined in §74.3.

(2) Exceptions to this paragraph are contained in paragraphs (b) through (d) of this section.

(b) *Equipment records.* The retention period for the equipment records required by §74.140(a) starts from the date of the equipment's disposition (§74.139) or replacement (§74.138) or transfer at the direction of the awarding party (§74.136).

(c) *Records for income transactions after grant or subgrant support.* (1) In some cases an ED requirement concerning the disposition of program income, as defined in Subpart F of this part, will be satisfied by applying the income to costs incurred after expiration or termination of grant or subgrant support for the activity giving rise to the income. In such a case, the retention period for the records pertaining to the costs starts from the end of the recipient's fiscal year in which the costs are incurred.

(2) In some cases, there may be an ED requirement concerning the disposition of copyright royalties or other program income which is earned after expiration or termination of grant or subgrant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the recipient's fiscal year in which the income is earned. (See Subpart F of this part.)

(d) *Indirect cost rate proposals, cost allocation plant, etc.*-(1) *Applicability.* This paragraph applies to the following types of documents, and their supporting records:

(i) Indirect cost rate computations or proposals;

(ii) Any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(2) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(3) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government for negotiation purposes, then the 3-year retention period for the proposal, plan, or computation and its supporting records starts from the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

CROSS-REFERENCE: See 34 CFR 75.734-Record retention period. Section 75.734 contains record retention requirements imposed by the General Education Provisions Act.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.23 Substitution of microfilm.

Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.24 Access to records.

(a) *Records of grantees.* The Secretary and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any books, documents, papers, or other records of the grantee which are pertinent to the ED grant, in order to make audit, examination, excerpts, and transcripts.

(b) *Records of subgrantees.* The Secretary, the Comptroller General of the United States, and the grantee, or any of their authorized representatives, shall have the right of access to any books, documents, papers, or other records of the subgrantee which are pertinent to the ED grant, in order to make audit, examination, excerpts, and transcripts.

(c) *Records of contractors and subcontractors.* Except as provided in §74.20(b), the Secretary, the Comptroller General of the United States, the grantee, and (if the contract was awarded under a subgrant) the subgrantee, or any of their authorized representatives, shall have the right of access to any books, documents, papers, or other records of the contractor or subcontractor which are pertinent to the ED grant, in order to make audit, examination, excerpts, and transcripts.

(d) *Expiration of right of access.* The rights of access in this section shall not be limited to the required retention period but shall last as long as the records are retained.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.25 Restrictions on public access.

Unless required by Federal statutes, awarding parties may not impose grant terms which limit public access to records covered by this subpart except after a determination by ED that the records must be kept confidential and would have been excepted from disclosure under ED's "Freedom of Information" regulation (part 5 of this title) if the records had belonged to ED. This section does not require recipients or their contractors and subcontractors to permit public access to their records.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

Subpart E-[Reserved]

Subpart F-Grant-Related Income

§ 74.40 Scope of subpart.

This subpart contains policies and requirements relating to (a) program income and (b) interest and other investment income earned on advances of grant funds.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.41 Meaning of program income.

(a) Except as explained in paragraphs (b) and (c) of this section, program income means gross income earned by a recipient from activities part or all of the cost of which is either borne as a direct cost by a grant or counted as a direct cost towards meeting a cost sharing or matching requirement of a grant. It includes but is not limited to such income in the form of fees for services performed during the grant or subgrant period, proceeds from sale of tangible personal or real property, usage or rental fees, and patent or copyright royalties. If income meets this definition, it shall be considered program income regardless of the method used to calculate the amount paid to the recipient-whether, for example, by a cost-reimbursement method or fixed price arrangement. Nor will the fact that the income is earned by the recipient from a Federal procurement contract or from a procurement contract under a Federal grant awarded to another party affect the income's classification as program income.

(b) For research grants that are subject to an institutional cost-sharing agreement, income shall be considered program income only if it is earned from an activity part of all or the cost of which is borne as a direct cost by the Federal grant funds. An institutional cost-sharing agreement is one entered into between ED and a grantee covering all of ED's research project grants to the grantee in the aggregate.

(c) The following shall not be considered program income:

(1) [Reserved]

(2) Tuition and related fees received by an institution of higher education for a regularly offered course taught by an employee performing under a grant or subgrant.

(d) For the purposes of this subpart, program income is divided into several categories. Each category is treated in a separate section of this subpart.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.42 General program income.

(a) *Definition.* General program income means all program income accruing to a grantee during the period of grant support or to a subgrantee during the period of subgrant support, other than the special categories of such income treated in §§74.43 through 74.45.

(b) *Use.* General program income shall be retained by the recipient and used in accordance with one or a combination of the alternatives in paragraphs (c), (d), and (e) of this section, as follows: The alternative in paragraph (c) of this section may always be used by recipients and must be used if neither of the other two alternatives is permitted by the terms of the grant. The alternatives in paragraph (d) or (e) of this section may be used only if expressly permitted by the terms of the grant. In specifying alternatives that may be used, the terms of the grant may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income.

(c) *Deduction alternative.* (1) Under this alternative, the income is used for allowable costs of the project or program. If there is a cost-sharing or matching requirement, costs borne by the income may not count toward satisfying that requirement. Therefore, the maximum percentage of Federal participation is applied to the net amount determined by deducting the income from total allowable costs and third-party in-kind contributions. The income shall be used for current costs unless ED authorizes deferral to a later period.

(2) To illustrate this alternative, assume a project in which the grantee incurs $100,000 of allowable costs and receives no third-party in-kind contributions. If the grantee earns $10,000 in general program income and this alternative applies, that $10,000 must be deducted from the $100,000 before applying the maximum percentage of Federal participation. If that percentage is 90 percent, the most that could be paid to the grantee would therefore be $81,000 (90 percent times $90,000).

(d) *Cost-sharing or matching alternative.* (1) Under this alternative, the income is used for allowable costs of the project or program but, in this case the costs borne by the income may count toward satisfying a cost-sharing or matching requirement. Therefore, the maximum percentage of Federal participation is applied to total allowable costs and third-party in-kind contributions. The income shall be used for current costs unless ED authorizes deferral to a later period.

(2) To illustrate this alternative, assume the same situation as in paragraph (c)(2) of this section. Under this alternative, the 90 percent maximum percentage of participation would be applied to the full $100,000, and $90,000 could therefore be paid to the grantee. (It should be noted that if $20,000 of general program income is earned, only $80,000 could be paid, since a grant cannot pay for costs which have been borne by general program income.)

(e) *Additional cost alternative.* Under this alternative, the income is used for costs which are in addition to the allowable costs of the project or program but which nevertheless further the objectives of the Federal statute under which the grant was made, Provided that the costs borne by the income further the broad objectives of that statute, they need not be of a kind that would be permissible as charges to Federal funds. Examples of purposes for which the income may be used are:

(1) Expanding the project or program.

(2) Continuing the project or program after grant or subgrant support ends.

(3) Supporting other projects or programs that further the broad objectives of the statute.

(4) Obtaining equipment or other assets needed for the project or program or for other activities that further the statute's objectives.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.43 Program income-proceeds from sale of real property and from sale of equipment and supplies acquired for use.

The following kinds of program income shall be governed by Subpart O of this part:

(a) Proceeds from the sale of real property purchased or constructed under a grant or subgrant.

(b) Proceeds from the sale of equipment and supplies fabricated or purchased under a grant or subgrant and intended primarily for use in the grant- or subgrant-supported project or program rather than for sale or rental.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.44 Program income-royalties and other income earned from a copyrighted work.

(a) This section applies to royalties, license fees, and other income earned by a recipient from a copyrighted work developed under the grant or subgrant. Income of that kind is covered by this section whether a third party or the recipient itself acts as the publisher, seller, exhibitor, or performer of the copyrighted work. In some cases the recipient incurs costs to earn the income but does not charge these costs to ED grant funds, to required cost-sharing or matching funds, or to other program income. Costs of that kind may be deducted from the gross income in order to determine how much must be treated as program income.

(b) The terms of the grant govern the disposition of income subject to this section. If the terms do not treat this kind of income, there are no ED requirements governing the disposition.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.45 Program income-royalties or equivalent income earned from patents or from inventions.

Disposition of royalties or equivalent income earned on patents or inventions arising out of activities assisted by a grant or subgrant shall be governed by determinations made or agreements entered into under ED's patent regulations. (See parts 6 and 8 of this title.) If the determination or agreement does not provide for the disposition of the royalties or equivalent income, the disposition shall be in accordance with the recipients' own policies.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.46 Program income-income after grant or subgrant support not otherwise treated.

(a) This section applies to program income not treated elsewhere in this part which arises from or is attributable to an activity while supported by a grant or subgrant but which does not accrue until after the period of grant or subgrant support. An example is proceeds from the sale or rental of a residual inventory or merchandise fabricated or purchased by a grant-supported workshop during the period of support.

(b) The terms of the grant govern the disposition of income subject to this section. If the terms do not treat this kind of income, there are no ED requirements governing the disposition.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.47 Interest earned on advances of grant funds.

(a) Unless exempted by Federal statute (see paragraph (b) of this section for the principal exemption)-

(1) Recipients shall maintain advances of Federal funds in interest-bearing accounts pending disbursement;

(2) Interest earned on Federal advances deposited in those accounts must be remitted promptly, but at least quarterly, to the Department; and

(3) A recipient may retain interest income up to $100 per year to assist in the recoupment of administrative expenses.

(b) In accordance with 31 U.S.C. 6503, States are not accountable to the Federal Government for interest earned by the State itself, or by its subgrantees, if this income is earned on an advance of funds made under a Department grant.

(c) Recipients are subject to the provisions in §74.61(e) for minimizing the time between the transfer of advances their disbursement. Those provisions apply even if there is no accountability to the Federal Government for interest or other investment income earned on the advances.

(d) The following definitions apply to this section:

(1) *Interest* includes any interest or investment income earned by grantees, subgrantees, and cost-type contractors on advances of Department grant funds to the grantee.

(2) *State* includes any agency or instrumentality of a State but does not include any local government in a State.

(3) Notwithstanding the definition of "grant" in §74.3, the word "grant", as used in this section, has the meaning given in 31 U.S.C. 6501(4)(A).

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

[57 FR 30335, July 8, 1992]

Subpart G-Cost Sharing or Matching

§ 74.50 Scope of subpart.

(a) This subpart contains rules for satisfying Federal requirements for cost sharing or matching. These rules apply whether the cost sharing or matching is required by Federal statute or by other terms of the grant.

(b) ED and a grantee may enter into an institutional cost-sharing agreement covering all of ED's research project grants to that grantee in the aggregate. Except as provided by the institutional cost-sharing agreement, this subpart applies to the satisfaction of the grantee's obligation under the agreement, as well as to the satisfaction of cost-sharing or matching requirements that apply only to a single grant.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.51 Definitions.

For purposes of this subpart:

Cost sharing or matching means the value of third-party in-kind contributions and that portion of the costs of a grant-supported project or program not borne by the Federal Government.

Equipment has the same meaning given to that term in §74.132,
except that instead of "acquisition cost," the words "market value at the time of donation" shall be substituted.

Supplies means all tangible personal property other than "equipment" as defined in this section.

Third-party in-kind contributions means property or services which benefit a grant-supported project or program and which are contributed by non-Federal third parties without charge to the grantee, the subgrantee, or a cost-type contractor under the grant or subgrant.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.52 Basic rule: Costs and contributions acceptable.

With the qualifications and exceptions listed in §74.53, a cost-sharing or matching requirement may be satisfied by either or both of the following:

(a) Allowable costs incurred by the grantee, the subgrantee, or a cost-type contractor under the grant or subgrant. This includes allowable costs borne by non-Federal grants or by other cash donations from non-Federal third parties.

(b) The value of third-party in-kind contributions applicable to the period to which the cost-sharing or matching requirement applies.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.53 Qualifications and exceptions.

(a) *Costs borne by other Federal grants.* Except as provided by Federal statute, a cost-sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to costs borne by general program income earned from a contract awarded under another Federal grant.

(b) *Costs or contributions counted towards other Federal cost-sharing requirements.* Neither costs nor the values of third-party in-kind contributions may count towards satisfying a cost-sharing or matching requirement of an ED grant if they have been or will be counted towards satisfying a cost-sharing or matching requirement of another Federal grant, a Federal procurement contract, or any other award of Federal funds.

(c) *Costs financed by general program income.* Costs financed by general program income, as defined in §74.42, shall not count towards satisfying a cost-sharing or matching requirement of the ED grant supporting the activity giving rise to the income unless the terms of the grant expressly permit the income to be used for cost sharing or matching. (This is the alternative for use of general program income described in §74.42(d).)

(d) *Records.* Costs and third-party in-kind contributions counting towards satisfying a cost-sharing or matching requirement must be verifiable from the records of recipients or cost-type contractors. These records must show how the value placed on third-party in-kind contributions was arrived at. To the extent feasible, volunteer services shall be supported by the same methods that the organization uses to support the allocability of its regular personnel costs.

(e) *Special standards for third-party in-kind contributions.* (1) Third-party in-kind contributions shall count towards satisfying a cost-sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(2) A third-party in-kind contribution shall not count as direct cost sharing or matching where, if the party receiving the contribution were to pay for it, the payment would be an indirect cost. Cost-sharing or matching credit for such contributions shall be given only if the recipient or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(3) The values placed on third-party in-kind contributions for cost-sharing or matching purposes shall conform to the rules in the succeeding sections of this subpart. If a third party in-kind contribution is of a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.54 Valuation of donated services.

(a) *Volunteer services.* Unpaid services provided to a recipient by individuals shall be valued at rates consistent with those ordinarily paid for similar work in the recipient's organization. If the recipient does not have employees performing similar work, the rates shall be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(b) *Employees of other organizations.* When an employer other than a recipient or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services shall be valued at the employee's regular rate of pay exclusive of the employer's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (a) of this section shall apply.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.55 Valuation of donated supplies and loaned equipment or space.

(a) If a third party donates supplies, the contribution shall be valued at the market value of the supplies at the time of donation.

(b) If a third party donates the use of equipment or space in a building but retains title, the contribution shall be valued at the fair rental rate of the equipment or space.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.56 Valuation of donated equipment, buildings, and land.

If a third party donates equipment, buildings or land, and title passes to a recipient, the treatment of the donated property shall depend upon the purpose of the grant, as follows:

(a) *Awards for capital expenditures.* If the purpose of the grant is to assist the recipient in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching.

(b) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant, the following rules apply:

(1) If approval is obtained from the awarding party, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In all cases, the approval may be given only if a purchase of the equipment or buildings or a purchase or rental of the land would be approved as an allowable direct cost.

(2) If approval is not obtained under paragraph (b)(1) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the recipient. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in subpart Q of this part, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.57 Appraisal of real property.

In some cases under §§74.55 and 56., it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, ED may require that the market value or fair rental rate be established by a certified real property appraiser (or by a representative of the U.S. General Services Administration, if available) and that the value or rate be certified by a responsible official of the party to which the property or its use is donated.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

Subpart H-Standards for Grantee and Subgrantee Financial Management Systems and Non-Federal Audits

§ 74.60 Scope of subpart.

(a) This subpart contains standards for financial management systems and non-Federal audits of recipients.

(b) Awarding parties may not impose on recipients additional financial management standards or requirements concerning non-Federal audits. The awarding parties may, however, provide recipients with suggestions and assistance on these subjects.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.61 Financial management standards.

Grantees and subgrantees shall meet the following standards for their grant and subgrant financial management systems.

(a) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of each project or program shall be made in accordance with the financial reporting requirements of the grant or subgrant. The terms of grants and subgrants shall not require financial reporting on the accrual basis if the recipient's accounting system is maintained on the cash basis. When accrual reporting is statutorily required, a recipient whose accounting system is not maintained on that basis shall not be required to convert it to the accrual basis; the recipient may develop the accrual information through an analysis of the documentation on hand.

(b) *Accounting records.* Records which identify adequately the source and application of funds for grant or subgrant-supported activities shall be maintained. These records shall contain information pertaining to grant or subgrant awards, authorizations, obligations, unobligated balances, assets, outlays, income, and, if the recipient is a government, liabilities.

(c) *Internal control.* Effective control and accountability shall be maintained for all grant or subgrant cash, real and personal property covered by subpart O of this part, and other assets. Recipients shall adequately safeguard all such property and shall assure that it is used solely for authorized purposes.

(d) *Budgetary control.* The actual and budgeted amounts for each grant or subgrant shall be compared. If appropriate or specifically required, recipients shall relate financial information to performance or productivity data, including the production of unit cost information. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(e) *Advance payments.* Procedures shall be established to minimize the time elapsing between the advance of Federal grant or subgrant funds and their disbursement by the recipient. When advances are made by a letter-of-credit method, the recipient shall make drawdowns as close as possible to the time of making disbursements. Grantees advancing cash to subgrantees shall conform substantially to the same standards of timing and amount as apply to advances by Federal agencies to grantees, including requirements for timely reporting of cash disbursements and balances. (See subpart K of this part.)

(f) *Allowable costs.* Procedures shall be established for determining the reasonableness, allowability, and allocability of costs in accordance with the applicable cost principles prescribed by subpart Q of this part and the terms of the grant.

(g) *Source documentation.* Accounting records shall be supported by source documentation such as cancelled checks, paid bills, payrolls, contract and subgrant award documents, etc.

(h)(1) This paragraph applies to each grantee or subgrantee that is not subject to the audit requirements specified in 34 CFR 80.26(a).

(2) Public hospitals and public colleges and universities are subject to this paragraph if excluded from the single audit conducted under 34 CFR 80.26.

(3) Each grantee shall have audits conducted as required under OMB Circular A-133.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

[53 FR 8106, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988; 56 FR 1698, Jan. 16, 1991]

Subpart I-Financial Reporting Requirements

§ 74.70 Scope and applicability of subpart.

This subpart prescribes requirements and forms for grantees to report financial information to ED, and to request grant payments when a letter of credit is not used.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.71 Definitions.

As used in this subpart or in the forms identified by this subpart:

Accrued expenditures are the charges by grantee during a given period requiring the provision of funds for: (a) Goods and other tangible property received; (b) services performed by employees, contractors, and other payees; and (c) amounts "becoming owed" for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

Accrued income is the sum of (a) earnings during a given period from services performed by the grantee and from goods and other tangible property delivered to purchasers, and (b) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

Federal funds authorized means the total amount of Federal funds obligated by the Federal Government and authorized for use by the grantee.

In-kind contributions means *third party in-kind contributions* as defined in subpart G of this part.

Obligations are the amounts of orders placed, contracts awarded, services received, and similar transactions during a given period, which will require payment during the same or a future period.

Outlays are charges made to the grant project or program. Outlays may be reported on a cash or accrual basis.

Program income has the same meaning it has in subpart F of this part.

Unliquidated obligations, for reports prepared on a cash basis, are the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they are the amount of obligations incurred by the grantee for which an outlay has not been recorded.

Unobligated balance is the portion of the Federal funds authorized which has not been obligated by the grantee and is determined by deducting the grantee's cumulative obligations from the cumulative Federal funds authorized.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.72 General.

(a) Except as provided in paragraphs (d) and (e) of this section, grantees shall use only the forms specified in §§74.73 through 74.76, and such supplementary or other forms as may from time to time be authorized by ED, for:

(1) Submitting grant financial reports to granting agencies, or

(2) Requesting advances or reimbursements when letters of credit are not used.

(b) Grantees shall follow all applicable standard instructions issued by OMB for use in connection with the forms specified in §§74.73 through 74.76. ED may issue substantive supplementary instructions. ED may shade out or instruct the grantee to disregard any line item that ED finds unnecessary for its decision making purposes.

(c) Grantees will not be required to submit more than the original and two copies of forms required under this subpart.

(d) ED may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. ED may accept the required information from grantees in machine usable format or computer printouts instead of prescribed formats.

(e) When ED has determined that a grantee's accounting system does not meet the standards for financial management systems contained in subpart H of this part, it may require financial reports with more frequency or more detail (or both), upon written notice to the grantee (without regard to §74.7), until such time as the standards are met.

(f) ED may waive any report required by this subpart if not needed.

(g) ED may extend the due date for any financial report upon receiving a justified request from the grantee.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.73 Accounting basis for reports; the financial status report.

(a) Each grantee shall report program outlays and program income on the same accounting basis, either cash or accrued expenditure (accrual), that it uses in its accounting system.

(b) The Secretary may require a grantee to use Standard Form 269, Financial Status Report, to report the Status of funds for nonconstruction grants.

(c) *Frequency.* ED may prescribe the frequency of the report for each project or program. However, the report shall not be required more frequently than quarterly except as provided in §§74.7 and 72.(e). If ED does not specify the frequency of the report, it shall be submitted annually. A final report shall be required upon expiration or termination of grant support.

(d) *Due date.* When reports are required on a quarterly or semiannual basis, they shall be due 30 days after the reporting period. When required on an annual basis, they shall be due 90 days after the grant year. Final reports shall be due 90 days after the expiration or termination of grant support.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

[53 FR 8106, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988; 57 FR 30335, July 8, 1992]

§ 74.74 Federal Cash Transactions Report.

(a) *Reporting payments.* (1) The Secretary may require a grantee to submit Standard Form 272 to report payments under a grant.

(2) This report is used by the Secretary to monitor cash advanced to the grantee and to obtain disbursement or outlay information for each grant. The Secretary may also use this form to determine the status of funds for a nonconstruction grant.

(b) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the "Remarks" section of the report.

(c) *Cash in hands of secondary recipients.* If the submission of a report is considered necessary and feasible by the Secretary, the Secretary may require a grantee to report the amount of cash subadvances in excess of three days' need in the hands of its subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(d) *Frequency and due date.* A grantee shall submit the report on a quarterly basis. If a Department grant authorizes advances at an annualized rate of one million dollars or more, the Secretary may require submission of the report on a monthly basis.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

[53 FR 8106, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988; 57 FR 30335, July 8, 1992]

§ 74.75 Request for Advance or Reimbursement.

(a) The Secretary includes in the terms and conditions of a grant-

(1) A statement about whether the grantee will be paid by advance or reimbursement; and

(2) Instructions regarding how the grantee must request advances or reimbursements under the grant.

(b) Pursuant to any applicable regulations, the Secretary may change, at any time, the method of making payments to a grantee.

(c) The frequency for submitting payment requests is treated in §74.96.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

[53 FR 8106, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988; 57 FR 30336, July 8, 1992]

EFFECTIVE DATE NOTE: At 57 FR 30336, July 8, 1992, §74.75 was amended by revising paragraph (a); redesignating paragraph (b) as (c) and adding a new paragraph (b), effective after the information collection requirements have been approved by the Office of Management and Budget. The Department of Education will publish a document in the *Federal Register* at a later date, announcing the effective date once OMB approval has been obtained. For the convenience of the user, the superseded text appears below.

§ 74.75 Request for Advance or Reimbursement

(a)(1) *Advance payments* Requests for Treasury check advance payments shall be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form is not used for drawdowns under a letter of credit or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.

* * * * *

§ 74.76 Outlay report and request for reimbursement for construction programs.

(a) *Construction grants paid by reimbursement method.* (1) Requests for reimbursement under construction grants shall be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. ED may, however, prescribe the Request for Advance or Reimbursement form specified in §74.75 instead of this form.

(2) The frequency for submitting reimbursement requests is treated in §74.96

(b) *Construction grants paid by letter of credit or Treasury check advance.* (1) When a construction grant is paid by letter of credit or Treasury check advances, the grantee shall report its outlays to ED using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. ED will provide any necessary special instruction. However, frequency and due date shall be governed by §74.73 (c) and (d).

(2) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances shall be requested on the form specified in §74.75.

(3) ED may substitute the Financial Status Report specified in §74.73 for the Outlay Report and Request for Reimbursement.

(c) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by §74.73(a).

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

[53 FR 8106, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988; 57 FR 30336, July 8, 1992]

Subpart J-Monitoring and Reporting of Program Performance

§ 74.80 Scope of subpart.

This subpart sets forth the procedures for monitoring and reporting program performance of recipients. These procedures are designed to place reliance on recipients to manage the day-to-day operations of their grant- and subgrant-supported activities.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.81 Monitoring by recipients.

Recipients shall monitor the performance of grant- and subgrant-supported activities. They shall review each program, function, or activity to assure that adequate progress is being made towards achieving the goals of the grant or subgrant.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.82 Performance reports under nonconstruction grants.

(a) Where ED determines that performance information sufficient to meet its programmatic needs will be available from subsequent applications, ED will require the grantee to submit a performance report only upon expiration or termination of grant support. This report will be due on the same date as the final financial Status Report unless waived by ED. Note that the "Application for Federal Assistance (Nonconstruction Programs)" prescribed by subpart N of this part, when used to request continued support, provides information substantially equivalent to a performance report.

(b) Except as provided in paragraph (a) of this section, grantees shall submit annual performance reports unless ED requires quarterly or semiannual reports. Annual reports shall be due 90 days after the grant year; quarterly or semiannual reports shall be due 30 days after the reporting period. A final performance report shall be due 90 days after the expiration or termination of grant support. ED may extend the due date for any performance report upon receiving a justified request from the grantee. In addition, ED may waive the requirement for any performance report which is not needed.

(c) The content of performance reports shall conform to any instructions issued by the granting agency, including, to the extent appropriate to the particular grant, a brief presentation of the following for each program, function, or activity involved:

(1) A comparison of actual accomplishments to the goals established for the period. Where the output of the project or program can be readily expressed in numbers, a computation of the cost per unit of output may be required if that information will be useful.

(2) The reasons for slippage if established goals were not met.

(3) Other pertinent information including, when appropriate, analysis and explanation of unexpectedly high overall or unit costs.

(d) Grantees will not be required to submit more than the original and two copies of performance reports.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

[53 FR 8106, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 74.83 Performance reports under construction grants.

In general, awarding parties rely heavily on on-site technical inspection and certified percentage-of-completion data to keep themselves informed as to progress under construction grants. Formal performance reports to supplement those sources of information shall be required only if considered necessary by the awarding party, and in no case more frequently than quarterly.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.84 Significant developments between scheduled reporting dates.

Between the scheduled performance reporting dates, events may occur which have significant impact upon the grant- or subgrant-supported activity. In such cases, the recipient shall inform the awarding party as soon as the following types of conditions become known:

(a) Problems, delays, or adverse conditions which will materially impair the ability to attain the objective of the award. This disclosure shall be accompanied by a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(b) Favorable developments which enable meeting time schedules and goals sooner or at less cost than anticipated or producing more beneficial results than originally projected.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.85 Site visits.

Site visits may be made as necessary by representatives of ED to:

(a) Review program accomplishments and management control systems.

(b) Provided such technical assistance as may be required.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

Subpart K-Grant and Subgrant Payment Requirements

§ 74.90 Scope of subpart.

This subpart prescribes the basic standard and the methods under which ED will make grant payments to grantees.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.91 Definitions.

As used in this subpart:

Advance is a payment made by the Department to a grantee, upon its periodic request or through the use of predetermined payment schedules, before outstanding obligations are liquidated by the grantee.

Letter of credit is an instrument certified by an authorized official which authorizes a recipient to draw funds needed for immediate disbursement in accordance with Treasury Circular No. 1075.

Percentage of completion method refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's rate of disbursements.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

[53 FR 8106, Mar. 11, 1988, as amended at 57 FR 30336, July 8, 1992]

§ 74.92 Basic standard.

Methods and procedures for making payments to recipients shall minimize the time elapsing between the transfer of funds and the recipient's disbursements.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.93 Payment methods under Department grants.

The Department makes payments to a grantee using the most efficient and cost-effective method available in accordance with Treasury Circular 1075 (31 CFR part 205) and any supplementary instructions prescribed by the Department of the Treasury.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

[57 FR 30336, July 8, 1992]

§ 74.95 Withholding of payments.

(a) Unless otherwise required by Federal statute, payments for proper charges incurred by grantees will not be withheld unless (1) the grantee has failed to comply with Federal reporting requirements or (2) the grant is suspended pursuant to §74.114 or (3) the grantee owes money to the United States and collection of the debt by withholding grant payments will not impair the accomplishment of the objectives of any grant program sponsored by the United States.

(b) Cash withheld for failure to comply with reporting requirements but without suspension of the grant will be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with §74.114. When a debt is to be collected, ED may withhold payments or require appropriate accounting adjustments to recorded grant cash balances for which the grantee is accountable to the Federal Government, in order to liquidate the indebtedness.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.96 Establishing frequency of payments.

The Secretary determines the frequency with which a grantee may make requests for payment in accordance with Treasury Circular 1075 (31 CFR part 205) and any supplementary instructions prescribed by the Department of the Treasury.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

[57 FR 30336, July 8, 1992]

Subpart L-Programmatic Changes and Budget Revisions

74.100 Scope and applicability of this subpart.

This subpart deals with prior approval requirements for post-award programmatic changes and budget revisions by recipients.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.101 Relationship to cost principles.

The cost principles in Appendices D and E to this part contain requirements for prior approval of certain types of cost (see §74.176). Except when waived, those requirements apply to all grants and subgrants even if §§74.103 through 74.106 do not.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.102 Prior approval procedures.

(a) *For grants.* When requesting a prior approval required by this subpart, grantees shall address their requests to the responsible ED grants officer. Approvals shall not be valid unless they are in writing and signed by the authorized ED official.

(b) *Timing.* Within 30 days from the date of receipt of a request for approval, the approval authority shall review the request and notify the recipient of its decision. If the request for approval is still under consideration at the end of 30 days, the approval authority shall inform the recipient in writing as to when to expect the decision.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.103 Programmatic changes.

(a) *Scope.* This section contains requirements for prior approval of departures, other than budget revisions, from approved project plans. In addition to the requirements in this section, awarding parties may require prior approval for other kinds of programmatic changes to an approved grant project.

(b) *Changes to project scope or objectives.* The recipient shall obtain prior approval for any change to the scope or objectives of the approved project. (For construction projects, any material change in approved space utilization or functional layout shall be considered a change in scope.)

(c) *Changes in key people.* The recipient of a grant or subgrant for research (or any other kind of grant or subgrant if the terms of the award make this rule applicable) shall obtain prior approval:

(1) To continue the project during any continuous period of more than 3 months without the active direction of an approved project director or principal investigator; or

(2) To replace the project director or principal investigator (or any other persons named and expressly identified as key project people in the notice of grant or subgrant award) or to permit any such people to devote substantially less effort to the project than was anticipated when the grant or subgrant was awarded.

(d) *Other programmatic changes.* The following shall require prior approval except to the extent explicitly included in the project plan as approved by the awarding party at the time of award:

(1) Transferring to a third party, by contracting or any other means, the actual performance of the substantive programmatic work. The term "substantive programmatic work" means activities which are central to carrying out the purpose of the project, and not merely incidental. Transfer of substantive programmatic work does not include purchase of supplies, materials, or equipment; acquisition of general or incidental support services; obtaining advice; or transfer of activities whose cost is treated as an indirect cost.

(2) Providing medical care to individuals under research grants.

CROSS-REFERENCE: See 34 CFR 75.708-Prohibition of subgrants.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.104 Budgets generally.

(a) *Definitions.* In this subpart:

(1) *Budget* means the recipient's financial plan for carrying out the project or program.

(2) *Approved budget* means a budget (including any revised budget) which has been approved by the awarding party.

(b) *Research project budgets.* For research projects, approved budgets shall not include the recipient's share of project costs.

(c) *Non-research project budgets.* For non-research projects which involve cost sharing or matching, approved budgets shall ordinarily consist of a single set of figures covering total project cost (the sum of the awarding party's share and the recipient's share). However, the awarding party may specify that the recipient's share not be included in the approved budget. In no case, however, shall the approved budget be in the form of a separate set of figures for each share.

(d) *Subdivision by programmatic segments.* Some grants encompass two or more programmatic segments (such as discrete programs, projects, functions, or types of activities). In these cases, the awarding party may require that the approved budget be subdivided to show the anticipated cost of each programmatic segment.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.105 Budget revisions-nonconstruction projects.

(a) Except as provided in paragraph (b) of this section, the recipient of a grant or subgrant having an approved budget shall obtain prior approval for any budget revision which will:

(1) Involve transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or

(2) Involve transfer of amounts previously budgeted for student support (tuition waivers, stipends, and other payments to or for trainees), or

(3) Result in a need for the award of additional funds, e.g., an increase in the base upon which indirect costs are calculated which will increase allocable indirect costs and result in a claim for a supplementary award.

(b) Any or all of the prior approval requirements in paragraph (a) of this section may be waived by the awarding party.

(c) Except as provided in §§74.107 and 176., other budget changes under nonconstruction grants do not require approval.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.106 Budget revisions-construction projects.

Unless provided otherwise by the terms of the grant or subgrant, revisions to construction project budgets do not require approval.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.107 Construction and nonconstruction work under the same grant.

When a grant provides support for both construction and nonconstruction work, the awarding party may require prior approval before any fund or budget transfers between the two types of work.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.108 Authorized funds exceeding needs.

The recipient shall notify the awarding party promptly whenever the amount of grant or subgrant authorized funds is expected to exceed needs by more than $5,000 or 5 percent of the grant or subgrant, whichever is greater. This notification will not be required under continuing grants or subgrants if the application for the next period's funding will include an estimate of what the unobligated balance of authorized funds will be at the end of the current period.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

Subpart M-Grant and Subgrant Closeout, Suspension, and Termination

§ 74.110 Definitions.

Grant closeout means the process by which ED determines that all applicable administrative actions and all required work of the grant have been completed by the grantee and ED.

Suspension of a grant means temporary withdrawal of the grantee's authority to obligate grant funds pending corrective action by the grantee or a decision to terminate the grant.

Termination of a grant means permanent withdrawal of the grantee's authority to obligate previously awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee. "Termination" does not include:

(a) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period;

(b) Refusal by ED to extend a grant or award additional funds (such as refusal to make a competing or noncompeting continuation, renewal, extension, or supplemental award);

(c) Withdrawal of the unobligated balance as of the expiration of a grant;

(d) Annulment, i.e., voiding, of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.111 Closeout.

(a) Each grant shall be closed out as promptly as is feasible after expiration or termination.

(b) In closing out ED grants, the following shall be observed:

(1) Upon request, ED shall promptly pay the grantee for any allowable reimbursable costs not covered by previous payments.

(2) The grantee shall immediately refund or otherwise dispose of, in accordance with instructions from ED, any unobligated balance of cash advanced to the grantee.

(3) The grantee shall submit, within 90 days of the date of expiration or termination, all financial, performance, and other reports required by the terms of the grant. ED may extend the due date for any report upon receiving a justified request from the grantee, and may waive any report which is not needed.

(4) ED shall make a settlement for any upward or downward adjustment of the Federal share of costs, to the extent called for by the terms of the grant.

(c)(1) The closeout of a grant does not affect the retention period for, or Federal rights of access to, grant records. See subpart D of this part.

(2) If a grant is closed out without audit, ED retains the right to disallow and recover an appropriate amount after fully considering any recommended disallowances resulting from an audit which may be conducted later.

(3) The closeout of a grant does not affect the grantee's responsibilities with respect to property under subpart O of this part, or with respect to any program income for which the grantee is still accountable under subpart F of this part.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.112 Amounts payable to the Federal Government.

For each grant, the following sums shall constitute a debt or debts owed by the grantee to the Federal Government, and shall, if not paid upon demand, be recovered from the grantee or its successor or assignees by setoff or other action as provided by law:

(a) Any grant funds paid to the grantee by the Federal Government in excess of the amount to which the grantee is finally determined to be entitled under the terms of the grant;

(b) Any interest or other investment income earned on advances of grant funds which is due the Federal Government pursuant to §74.47;

(c) Any royalties or other special classes of program income which, under the terms of the grant, are required to be remitted to the Federal Government (see subpart F of this part);

(d) Any amounts due the Federal Government under subpart O of this part; and

(e) Any other amounts finally determined to be due the Federal Government under the terms of the grant.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.113 Violation of terms.

(a) When a grantee has materially failed to comply with the terms of a grant, ED may suspend the grant, in accordance with §74.114, terminate the grant for cause, as provided in §74.115, or take such other remedies as may be legally available and appropriate in the circumstances.

(b) If a project or program is supported over two or more funding periods, a grant may be suspended or terminated in the current period for failure to submit a report still due from a prior period.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.114 Suspension.

(a) When a grantee has materially failed to comply with the terms of a grant, ED may, upon reasonable notice to the grantee, suspend the grant in whole or in part. The notice of suspension will state the reasons for the suspension, any corrective action required of the grantee, and the effective date. The suspension may be made effective at once if a delayed effective date would be unreasonable considering ED's responsibilities to protect the Federal Government's interest. Suspensions shall remain in effect until the grantee has taken corrective action satisfactory to ED or given evidence satisfactory to ED that such corrective action will be taken, or until ED terminates the grant.

(b) New obligations incurred by the grantee during the suspension period will not be allowed unless ED expressly authorizes them in the notice of suspension or an amendment to it. Necessary and otherwise allowable costs which the grantee could not reasonably avoid during the suspension period will be allowed if they result from obligations properly incurred by the grantee before the effective date of the suspension and not in anticipation of suspension or termination. At the discretion of ED, third-party in-kind contributions applicable to the suspension period may be allowed in satisfaction of cost sharing or matching requirements.

(c) Appropriate adjustments to payments under the suspended grant will be made either by withholding subsequent payments or by not allowing the grantee credit for disbursements made in payment of unauthorized obligations incurred during the suspension period.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.115 Termination.

(a) *Termination for cause.* ED may terminate any grant in whole, or in part, at any time before the date of expiration, whenever ED determines that the grantee has materially failed to comply with the terms of the grant. ED shall promptly notify the grantee in writing of the determination and the reasons for the termination, together with the effective date.

(b) *Termination on other grounds.* Except as provided in paragraph (a) of this section, grants may be terminated in whole or in part only as follows:

(1) By ED with the consent of the grantee, in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial terminations, the portion to be terminated, or

(2) By the grantee, upon written notification to ED, setting forth the reasons for such termination, the effective date, and in the case of partial terminations, the portion to be terminated. However, if, in the case of a partial termination, ED determines that the remaining portion of the grant will not accomplish the purposes for which the grant was made, ED may terminate the grant in its entirety under either paragraph (a) or paragraph (b)(1) of this section.

(c) *Termination settlements.* When a grant is terminated, the grantee shall not incur new obligations for the terminated portion after the effective date, and shall cancel as many outstanding obligations as possible. ED will allow full credit to the grantee for the Federal share of the noncancellable obligations properly incurred by the grantee prior to termination.

Subpart N-Forms for Applying for Grants

(Authority: 20 U.S.C. 3474; OMB Circular A-110)

§ 74.120 Scope of subpart.

(a) This subpart is not applicable to mandatory or formula grant programs which do not require applicants to apply to ED for funds on a project basis.

(b) ED may prescribe the form of applications by nongovernmental organizations (including hospitals and institutions of higher education operated by a government), and may use a standard facesheet for these applications.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.121 [Reserved]

§ 74.122 Preapplications for Federal assistance.

The purposes of preapplications shall be to:

(a) Establish communications between the applicant and ED;

(b) Determine the applicant's eligibility;

(c) Determine how well the project can compete with similar applications from others in order to discourage proposals which have little or no chance for Federal funding before applicants incur significant expenditures for preparing an application.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.123 Notice of preapplication review action.

(a) ED will inform applicants of the results of the review of the preapplications submitted to them.

(b) ED will send a notice to the applicant ordinarily within 45 days of the receipt of the preapplication form.

(c) If the review cannot be made within 45 days, the applicant will be informed by letter as to when the review will be completed.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§§ 74.124-74.126 [Reserved]

§ 74.127 Authorized forms and instructions for nongovernmental organizations.

Nongovernmental organizations shall use application forms and instructions prescribed by ED, except that the facesheet of such applications shall be standard form 424 for grants under programs covered by Executive Order 12372.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

Subpart O-Property

GENERAL

§ 74.130 Scope and applicability of this subpart.

(a) Except as explained in paragraphs (c), (d), and (e) of this section this subpart applies to real property, equipment, and supplies acquired with grant support. To be considered acquired with grant support, some or all of the property's acquisition cost must be a direct cost under the grant, a subgrant, or a cost-type contract and must be either borne by grant funds or counted toward satisfying a grant cost-sharing or matching requirement.

(b) This subpart also deals with inventions, patents, and copyrights arising out of activities assisted by a grant or subgrant.

(c) This subpart does not apply to:

(1) Property for which only depreciation or use allowances are charged;

(2) Property donated entirely as a third-party in-kind contribution (as defined in §74.51); or

(3) Equipment or supplies acquired primarily for sale or rental rather than for use.

(d) Equipment or supplies acquired by a contractor under a grant or subgrant shall be subject to this subpart only if, by terms of the contract, title vests in the grantee or subgrantee.

(e) For research grants that are subject to an institutional cost-sharing agreement (see §74.50(b)), real property, equipment, and supplies shall be subject to this subpart only if at least some part of the acquisition cost is borne as a direct cost by Federal grant funds.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.131 Prohibition against additional requirements.

Recipients may follow their own property management policies and procedures: *Provided*, They observe the requirements of this subpart. Awarding parties may not impose on recipients property requirements (including property reporting requirements) not authorized by this subpart, unless specifically required by Federal statutes or Executive Orders.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.132 Definitions.

As used in this subpart:

Acquisition of property includes purchase, construction, or fabrication of property, but does not include rental of property or alterations and renovations of real property.

Acquisition cost of an item of purchased equipment means the net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the equipment usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance shall be included in or excluded from the unit acquisition cost in accordance with the regular accounting practices of the organization purchasing the equipment. If the item is acquired by trading in another item and paying an additional amount, "acquisition cost" means the amount received for trade-in plus the additional outlay.

Amount received for trade-in of an item of equipment traded in for replacement equipment means the amount that would have been paid for the replacement equipment without a trade-in minus the amount paid with the trade-in. The term refers to the actual difference, not necessarily the trade-in value shown on an invoice.

Equipment means tangible personal property having a useful life of more than one year and an acquisition cost of $300 or more per unit except that organizations subject to Cost Accounting Standards Board (CASB) regulations may use the CASB standard of $500 or more per unit and useful life of two years. An organization may use its own definition of equipment: *Provided,* That such definition would at least include all tangible personal property as defined herein.

Personal property means property of any kind except real property. It may be tangible-having physical existence, or intangible-having no physical existence, such as patents, inventions, and copyrights.

Real property means land, including land improvements, structures and appurtenances thereto, but excluding movable machinery and equipment.

Replacement equipment means property acquired to take the place of other equipment. To qualify as replacement equipment, it must serve the same function as the equipment replaced and must be of the same nature or character, although not necessarily the same model, grade, or quality.

Supplies means all tangible personal property other than equipment.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.133 Title to real property, equipment, and supplies.

Subject to the obligations and conditions set forth in this subpart, title to real property, equipment, and supplies acquired under a grant or subgrant shall vest, upon acquisition, in the grantee or subgrantee respectively.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

REAL PROPERTY

§ 74.134 Real property.

Except as otherwise provided by Federal statutes, real property to which this subpart applies shall be subject to the following requirements, in addition to any other requirements imposed by the terms of the grant:

(a) *Use.* The property shall be used for the originally authorized purpose as long as needed for that purpose. When no longer so needed, approval of the Secretary may be requested to use the property for other purposes. Use for other purposes shall be limited to:

(1) Projects or programs supported by other Federal grants or assistance agreements.

(2) Activities not supported by other Federal grants or assistance agreements but having, nevertheless, purposes consistent with those of the legislation under which the original grant was made.

(b) *Transfer of title.* Approval may be requested from ED to transfer title to an eligible third party for continued use for authorized purposes in accordance with paragraph (a) of this section. If approval is permissible under Federal statutes and is given, the terms of the transfer shall provide that the transferee shall assume all the rights and obligations of the transferor set forth in this subpart or in other terms of the grant or subgrant.

(c) *Disposition.* When the real property is no longer to be used as provided in paragraphs (a) and (b) of this section, the disposition instructions of ED shall be followed. Those instructions will provide for one of the following alternatives:

(1) The property shall be sold and the Federal Government shall be paid an amount computed by multiplying the Federal share of the property (see §74.142) times the proceeds from sale (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). Proper sales procedures shall be used that provide for competition to the extent practicable and result in the highest possible return.

(2) The recipient shall have the option either of selling the property in accordance with paragraph (c)(1) of this section or of retaining title. If title is retained, the Federal Government shall be paid an amount computed by multiplying the market value of the property by the Federal share of the property.

(3) The recipient shall transfer the title to either the Federal Government or an eligible non-Federal party named by ED. The grantee shall be entitled to be paid an amount computed by multiplying the market value of the property by the non-Federal share of the property. If the property belonged to a subgrantee, see §74.143 for subgrantee's share.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

EQUIPMENT AND SUPPLIES

§ 74.135 Exemptions for equipment and supplies subject to certain statutes.

(a) Some Federal statutes, in certain circumstances, permit title to equipment or supplies acquired with grant funds to vest in the recipient without further obligation to the Federal Government or on such terms and conditions as deemed appropriate. An example of such a statute is the Federal Grant and Cooperative Agreement Act of 1977, Pub. L. 95-224, which provides this authority for equipment and supplies purchased with the funds of grants (and Federal contracts and cooperative agreements) for the conduct of basic or applied scientific research at nonprofit institutions of higher education or at nonprofit organizations whose primary purpose is the conduct of scientific research.

(b) If equipment is subject to a statute of the kind described in paragraph (a) of this section, it shall be exempt from the requirements in the remaining sections of this subpart. However, an item of such equipment having a unit acquisition cost of $1,000 or more shall be subject to §74.136, concerning rights to require transfer, and, while subject to such a right, to the rules on replacement in §74.138.

(c) If supplies are subject to a statute of the kind described in paragraph (a) of this section, they shall be exempt from all provisions of the remainder of this subpart which would otherwise apply.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.136 Rights to require transfer of equipment.

(a) *ED right.* For items of equipment having a unit acquisition cost of $1,000 or more, ED shall have the right to require transfer of the equipment (including title) to the Federal Government or to an eligible non-Federal party named by ED. This right will normally be exercised by ED only if the project or program for which the equipment was acquired is transferred from one grantee to another. The right shall be subject to the following conditions:

(1) In order for ED to exercise the right, a specific notice that it is exercising the right or considering doing so must be issued no later than the 120th day after the end of ED grant support for the project or program for which the equipment was acquired. Furthermore:

(i) If the equipment is eligible for the exemptions in §74.135 and ceases to be needed for the project or program for which it was acquired while the project or program is still being performed by the recipient, the notice must have been received by the grantee while the equipment was still needed for that project or program.

(ii) If the equipment is not eligible for those exemptions, the notice must have been received by the grantee before other permissible disposition of the equipment took place in accordance with §74.139.

(2) If the right is exercised, the grantee shall be entitled to be paid any reasonable, resulting shipping or storage costs incurred, plus an amount computed by multiplying the market value of the equipment by the non-Federal share of the equipment. (See §§74.142 and 143..)

(b) *Equipment lists.* If at any time an awarding party is considering exercising its right to require transfer of equipment, it may require the recipient to furnish it a listing of all items of equipment that are subject to the right. This will enable the awarding party to determine which items, if any, should be transferred.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.137 Use of equipment.

(a) *Basic rule.* Equipment which has not been transferred under §74.136 shall be used by the recipient in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original project or program, the recipient shall use the equipment, if needed, in other projects or programs currently or previously sponsored by the Federal Government, in the following order of priority:

(1) Projects or programs currently or previously sponsored by ED.

(2) Projects or programs currently or previously sponsored by other Federal agencies.

(b) *Shared use.* If equipment is being used less than full time in the project or program for which it was originally acquired, the recipient shall make it available for use in other projects or programs currently or previously sponsored by the Federal Government: *Provided*, Such other use will not interfere with the work on the original project or program. First preference for such other use shall be given to other projects or programs sponsored by ED.

(c) *Use by other recipients.* When the recipient can no longer use the equipment as required by paragraph (a) of this section, it may voluntarily make the equipment available for use on projects or programs currently or previously sponsored by the Federal Government which the recipient is supporting through subgrants or through non-Federal grants. If the recipient is a subgrantee, it may also voluntarily make the equipment available for use on projects or programs currently or previously sponsored by the Federal Government which are being conducted or supported by the grantee.

(d) *Other uses.* Unless ED provides otherwise, while equipment is being used as described in the preceding paragraphs of this section, it may also be used part time for other purposes. However, use as described in those paragraphs shall be given priority over other uses.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.138 Replacement of equipment.

(a) Equipment may be exchanged for replacement equipment if needed. The replacement may take place either through trade-in or through sale and application of the proceeds to the acquisition cost of the replacement equipment. In either case, the transaction must be one which a prudent person would make in like circumstances.

(b) If an additional outlay to acquire the replacement equipment is charged as a direct cost to either Federal funds or required cost-sharing or matching under a Federal award, the replacement equipment shall be subject to whatever property requirements or exemptions are applicable to that award. If the award is a grant from ED the full acquisition cost of the replacement equipment shall determine which provisions of this subpart apply.

(c) For any replacement not covered by paragraph (b) of this section, the provisions of this subpart applicable to the equipment replaced shall carry over to the replacement equipment. However, none of the provisions of this subpart shall carry over if (1) the Federal share of the equipment replaced was 10 percent or less or (2) the product of that share times the amount received for trade-in or sale is $100 or less.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.139 Disposition of equipment.

When original or replacement equipment is no longer to be used in projects or programs currently or previously sponsored by the Federal Government, disposition of the equipment shall be made as follows:

(a) *Equipment with a unit acquisition cost of less than $1,000 and equipment with no further use value.* The equipment may be retained, sold, or otherwise disposed of, with no further obligation to the Federal Government.

(b) *All other equipment.* (1) The equipment may be retained or sold, and the Federal Government shall have a right to an amount calculated by multiplying the current market value or the proceeds from sale by the Federal share of the equipment (see §74.142). If part of the Federal share in the equipment came from an award under which the exemptions in §74.135 were applicable, the amount due shall be reduced pro rata. In any case, if the equipment is sold, $100 or 10 percent of the total sales proceeds, whichever is greater, may be deducted and retained from the amount otherwise due for selling and handling expenses.

(2) If the grantee's project or program for which or under which the equipment was acquired is still receiving grant support from the same Federal program and if ED approves, the net amount due may be used for allowable costs of that project or program. Otherwise, the net amount must be remitted to the granting agency by check.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.140 Equipment management requirements.

Procedures for managing equipment (including replacement equipment) until transfer, replacement, or disposition takes place shall, as a minimum, meet the following requirements:

(a) Property records shall be maintained accurately. (Retention and access requirements for these records are explained in subpart D of this part.) For each item of equipment, the records shall include:

(1) A description of the equipment, including manufacturer's model number, if any.

(2) An identification number, such as the manufacturer's serial number.

(3) Identification of the grant under which the recipient acquired the equipment.

(4) The information needed to calculate the Federal share of the equipment. (See §74.142.)

(5) Acquisition date and unit acquisition cost.

(6) Location, use, and condition of the equipment and the date the information was reported.

(7) All pertinent information on the ultimate transfer, replacement, or disposition of the equipment.

(b) A physical inventory of equipment shall be taken and the results reconciled with the property records at least once every 2 years to verify the existence, current utilization, and continued need for the equipment. A statistical sampling basis is acceptable. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the differences.

(c) A control system shall be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment. Any loss, damage, or theft of equipment shall be investigated and fully documented.

(d) Adequate maintenance procedures shall be implemented to keep the equipment in good condition.

(e) Where equipment is to be sold and the Federal Government is to have a right to part or all of the proceeds, selling procedures shall be established which will provide for competition to the extent practicable and result in the highest possible return.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

[53 FR 8106, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 74.141 Supplies.

(a) If supplies exceeding $1,000 in total aggregate market value are left over upon termination or expiration of the grant or subgrant for which they were acquired and the supplies are not needed for any project or program currently or previously sponsored by the Federal Government, the grant shall be credited by an amount computed by multiplying the Federal share of the supplies times the current market value or, if the supplies are sold, the proceeds from sale. If the supplies are sold, 10 percent of the proceeds may be deducted and retained from the credit, for selling and handling expenses.

(b) For possible exemptions from this section, see §74.135.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

FEDERAL SHARE OF REAL PROPERTY, EQUIPMENT, AND SUPPLIES

§ 74.142 Federal share of property.

Several sections of this subpart require a determination of the Federal (or non-Federal) share of real property, equipment, or supplies. In making such a determination, the following principles shall be observed:

(a) *General.* (1) Except as explained in the succeeding paragraphs of this section, the Federal share of the property shall be the same percentage as the Federal share of the acquiring party's total costs under the grant during the grant or subgrant year (or other funding period) to which the acquisition cost of the property was charged. For this purpose, "costs under the grant" means allowable costs which are either borne by the grant or counted towards satisfying a cost-sharing or matching requirement of the grant. Only costs are to be counted-not the value of third-party in-kind contributions.

(2) If the property is acquired by a subgrantee, the Federal share of the subgrantee's costs under the grant and hence of the property shall be calculated by multiplying the Federal share of the grantee's costs by the latter's share of the subgrantee's costs. For example, if the Federal share of a grantee's costs is 50 percent and the subgrant bears only 50 percent of a subgrantee's costs, then the Federal share of that subgrantee's costs (and of the property acquired by that subgrantee) is 25 percent.

(b) *Property acquired only partly under a grant.* (1) Sometimes only a part of the acquisition cost of an item of property is borne as a direct cost by the grant or counted as a direct cost towards a cost-sharing or matching requirement. The remainder might, for example, represent voluntary cost sharing or matching, or it might be charged to a different activity. Occasionally, the amount paid for the property is only a part of its value, and the remainder is donated as an in-kind contribution by the party that provided the property.

(2) To calculate the Federal share of such property, first determine the Federal share of the acquiring party's total costs under the grant, as explained in the paragraph (a) of this section. Then multiply that share by the percentage of the property's acquisition cost (or its market value, if the item was partly donated) which was borne as a direct cost by the grant or counted as a direct cost towards a cost-sharing or matching requirement.

(c) *Replacement equipment.* The Federal share of replacement equipment shall be calculated as follows:

(1) *Step 1.* Determine the Federal share (percentage) of the equipment replaced.

(2) *Step 2.* Determine the percentage of the replacement equipment's cost that was covered by the amount received for trade-in or the sales proceeds from the equipment replaced.

(3) *Step 3.* Multiply the step 1 percentage by the step 2 percentage.

(4) *Step 4.* If an additional outlay for the replacement equipment was charged as a direct cost either to ED grant funds or to required cost-sharing or matching funds, calculate the Federal share attributable to that additional outlay as explained in

paragraph (b)(2) of this section. Add that additional percentage to the step 3 percentage.

(d) *Institutional cost-sharing agreements.* If a grant is subject to an institutional cost-sharing agreement (see §74.130(e)), the Federal share of property acquired under the grant shall be calculated as though there were no cost-sharing requirements applicable to the grant (that is, as if all the grantee's cost sharing were voluntary).

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.143 Subgrantee's share of market value or sales proceeds.

Where this subpart requires a sharing of the market value or sales proceeds of property acquired under a subgrant, the non-Federal share shall be proportionally divided between the grantee and the subgrantee. The subgrantee shall be entitled to the amount it would have received or retained if the award to it had been made directly by the Federal Government. The remainder of the non-Federal share shall belong to the grantee.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

INTANGIBLE PERSONAL PROPERTY

§ 74.144 Inventions and patents.

ED's regulations on inventions and patents arising out of activities assisted by a grant are set forth in part 6 of this title.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

[53 FR 8106, Mar. 11, 1988, as amended at 57 FR 30336, July 8, 1992]

§ 74.145 Copyrights.

(a) *Works under grants.* Unless otherwise provided by the terms of the grant, when copyrightable material is developed in the course of or under a grant, the grantee is free to copyright the material or permit others to do so.

(b) *Works under subgrants.* Unless otherwise provided by the terms of the grant or subgrant, when copyrightable material is developed in the course of or under a subgrant, the subgrantee is free to copyright the material or permit others to do so.

(c) *ED rights.* If any copyrightable material is developed in the course of or under an ED grant or subgrant, ED shall have a royalty-free, nonexclusive, and irrevocable right to reproduce, publish, or otherwise use, and to authorize others to use, the work for Federal Government purposes.

(d) *Exemption of student-developed works.* ED awards training grants and other kinds of grants under which individuals are provided stipends or other financial assistance for the primary purpose of aiding them to further their education or training. Except as provided by the terms of the grant, copyrightable material developed by an individual or group of individuals in the course of education or training pursued with such assistance shall be subject to the ED right described in paragraph (c) of this section, unless the development of the material also receives other forms of support under the same or another ED grant (such as a research grant).

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

Subpart P-Procurement Standards

§ 74.160 Scope of subpart; terminology.

(a) This subpart contains standards for use by recipients in establishing procedures for the procurement of supplies, equipment, construction, and other services whose cost is borne in whole or in part as a direct cost by Federal grant funds.

(b) No additional procurement standards or requirements shall be imposed by awarding parties upon recipients unless specifically required by Federal statutes or Executive Orders.

(c) As used in this subpart:

(1) *Formal advertising* refers to that procurement method which involves adequate purchase description, sealed bids, and public opening of bids.

(2) *Negotiation* refers to any method of procurement other than formal advertising.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.161 General.

(a) Recipients may use their own procurement policies: *Provided,* That procurements subject to this subpart are made in accordance with the standards in this subpart.

(b) The standards in this subpart do not relieve the recipient of the contractual responsibilities arising under its contracts. The recipient is the responsible authority, without recourse to ED, regarding issues arising out of its procurements. This includes but is not limited to: Disputes, claims, protests of award, source evaluation, or other matters of a contractual nature. Matters concerning violation of law are to be referred to such local, State, or Federal authority as may have proper jurisdiction.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.162 Code of conduct.

(a) The recipient shall maintain a code of standards of conduct that shall govern the performance of its officers, employees or agents engaged in the awarding and administration of contracts that are subject to this subpart. The code or standards shall provide for disciplinary actions to be applied for violations of the code or standards by the recipient's officers, employees, or agents. For governmental recipients, such disciplinary actions are required only to the extent otherwise permissible under the Government's laws, rules, or regulations. To the extent permissible under its laws, rules, or regulations, the governmental recipient shall also provide for actions to be taken against contractors or their agents who wrongfully take part in a violation of the code or standards of conduct.

(b) The recipient's officers, employees or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or potential contractors. This is not intended to preclude bona-fide institutional fund-raising activities.

(c) No employee, officer, or agent of a nongovernmental recipient shall participate in the selection, award, or administration of a contract subject to this subpart where, to his or her knowledge, any of the following has a financial interest in that contract:

(1) The employee, officer, or agent;

(2) Any member of his or her immediate family;

(3) His or her partner;

(4) An organization in which any of the above is an officer, director, or employee;

(5) A person or organization with whom any of the above individuals is negotiating

or has any arrangement concerning prospective employment.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.163 Free competition.

(a) All procurement transactions shall be conducted in a manner to provide, to the maximum extent practicable, open and free competition.

(b) The recipient should be alert to organizational conflicts of interest or noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In particular, a contractor that develops or drafts specifications, requirements, a statement of work, an invitation for bids or a request for proposals for a particular procurement by a nongovernmental recipient should be excluded from competing for that procurement except when, upon request of the recipient, ED waives this requirement for a particular procurement.

(c) Solicitations shall clearly set forth all requirements that the bidder/offerer must fulfill in order for his bid/offer to be evaluated. Awards shall be made to the responsible bidder/offeror whose bid/offer is responsive to the solicitation and is most advantageous to the recipient, price and other factors considered. Factors such as discounts, transportation costs, and taxes may be considered in determining the lowest bid. Any and all bids/offers may be rejected when it is in the recipient's interest to do so, and, in the case of governmental recipients, such rejections are in accordance with the government's applicable law, rules, or regulations.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.164 Procedural requirements.

The recipient shall establish procurement procedures which provide for, as a minimum, the following:

(a) Proposed procurement actions shall follow a procedure to assure that unnecessary or duplicative items are not purchased. Where appropriate, an analysis shall be made of lease and purchase alternatives to determine which would be the most economical, practical procurement.

(b) Solicitations for goods and services shall be based upon a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. "Brand name or equal" description may be used as a means to define the performance of other salient requirements of a procurement, and when so used the specific features of the named brand which must be met by bidders/offerors should be clearly specified.

(c) Where applicable, section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)) shall be observed.

(d) Positive efforts shall be made by procuring parties to utilize small business and minority-owned business sources of supplies and services. Such efforts should allow these sources the maximum feasible opportunity to compete for contracts subject to this subpart.[1]

(e) The type of procuring instruments used-e.g., fixed-price contracts, cost reimbursable contracts, purchase orders, incentive contracts-shall be determined by the recipient but must be appropriate for the particular procurement and for promoting the best interest of the grant project or program involved. The "cost-plus-a-percentage-of-cost" method of contracting shall not be used.

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[1] Advice and assistance regarding the use of small and minority businesses may be obtained from the following Federal organizations:

1. The Small Business Administration and its field offices.
2. the Office of Minority Business Enterprise, Department of Commerce.
3. The Office for Civil Rights, ED.

(f) Contracts shall be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources.

(g) The terms of the grant may require that the following be submitted for prior approval of ED if the aggregate expenditure is expected to exceed $5,000: (1) Any proposed sole source contract and (2) any contract which a nongovernmental recipient proposes to award after seeking competition but receiving only one bid or proposal.

(h) Non governmental recipients should make some form of price or cost analysis in connection with every negotiated procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost proposed by the offeror to determine reasonableness, allocability and allowability.

(i) Procurement records and files for purchases in excess of $10,000 shall include the following:

(1) Basis for contractor selection;

(2) Justification for lack of competition when competitive bids or offers are not obtained;

(3) Basis for award cost or price.

(j) A system for contract administration shall be maintained to ensure contractor conformance with terms, conditions and specifications of the contract, and to ensure adequate and timely followup of all purchases.

§ 74.165 [Reserved]

§ 74.166 Contract provisions.

(a) *Scope.* This section contains requirements relating to provisions that must be included in contracts that are subject to this part. The requirements shall also apply to subcontracts of any tier under such contracts, and the term "contracts" in this section shall be construed as including subcontracts.

(b) *General.* All contracts shall contain sufficient provisions to define a sound and complete agreement.

(c) *Administrative remedies for violations.* Contracts in excess of $10,000 shall contain contractual provisions or conditions that will allow for administrative, contractual or legal remedies in instances in which contractors violate or breach contract terms, and provide for such remedial actions as appropriate.

(d) *Termination provisions.* Contracts in excess of $10,000 shall contain suitable provisions for termination by the party awarding the contract, including the manner by which termination will be effected and the basis for settlement. These contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(e) *Executive Order 11246.* Where applicable, construction contracts in excess of $10,000 shall contain a provision requiring compliance with Executive Order 11246, entitled "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented in

Department of Labor regulations (41 CFR part 60).

(f) *Copeland Act.* Contracts in excess of $2,000 for construction or repair shall include a provision for compliance with the Copeland "Anti-Kick-Back Act" (18 U.S.C. 874) as supplemented in Department of Labor regulation (29 CFR part 3). All suspected or reported violations shall be reported to the granting agency by the grantee.

(g) *Davis-Bacon Act.* When required by the Federal legislation governing the grant program, all construction contracts in excess of $2,000 shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) as supplemented by Department of Labor regulations (29 CFR part 5). All suspected or reported violations shall be reported to the granting agency by the grantee.

(h) *Contract Work Hours and Safety Standards Act.* All contracts subject to the Contract Work Hours and Safety Standards Act (40 U.S.C. 327 et seq.) shall include a provision requiring the contractor to comply with the applicable sections of the act and the Department of Labor's supplementing regulations (29 CFR parts 5 and 1926).

(i) *Inventions and patents.* Contracts which may give rise to inventions subject to part 6 of this title shall include a provision requiring compliance with those parts.

(j) *Access to Records.* Contracts that are subject to Subpart D of this part shall include a provision reflecting §74.24(c) on rights of access to the contractor's records.

(k) *Clean Air and Water Acts.* Contracts in excess of $100,000 shall contain provisions requiring compliance with all applicable standards, orders, or regulations issued pursuant to the Clean Air Act as amended (42 U.S.C. 1857 et seq.) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 et seq.). Violations shall be reported in writing to the appropriate regional office of the Environmental Protection Agency, and a copy of the report shall be submitted to the granting agency. (See 40 CFR part 15 for relevant regulations of the Environmental Protection Agency.)

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

Subpart Q-Cost Principles

§ 74.170 Scope of subpart.

This subpart identifies the principles to be used in determining costs applicable to grants, subgrants, and cost-type contracts under grants and subgrants.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

§ 74.171 Allowable costs.

(a) *Limitation on use of funds.* Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to a grantee or subgrantee.

(b) *Applicable cost principles.* For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

For the cost of a -	Use the principles in
Private nonprofit organization other than (1) An institution of higher education, (2) a hospital, or (3) an organization named in OMB Circular A-122 as not subject to that circular.	OMB Circular A-122
Educational institution	OMB Circular A-21
Hospital	Appendix E to 45 CFR Part 74
Commercial for-profit organization other than a hospital and an educational institution.	48 CFR Part 31 Contract Cost Principles and Procedures or uniform cost accounting standards that comply with cost principles acceptable to the Education Department.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

[57 FR 30336, July 8, 1992]

§ 74.175 Cost principles applicable to subgrants and cost-type contracts under grants.

The cost principles applicable to a subgrantee or cost-type contractor under a grant are not necessarily the same as those applicable to the grantee. For example, if a State government awards a subgrant or cost-type contract to an institution of higher education, OMB Circular A-21, as specified in §74.171, applies to the costs incurred by the institution of higher education, even though OMB Circular A-87 applies to the costs incurred by the State.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

[FR 8106, Mar. 11, 1988, as amended at 57 FR 30336, July 8, 1992

§ 74.176 Costs allowable with approval.

Each set of cost principles identifies certain costs that, in order to be allowable, must be approved by the awarding party. Other costs do not require approval. The following procedures govern approval of these costs.

(a) When costs are treated as indirect costs, acceptance of the costs as part of the indirect cost rate shall constitute approval.

(b)(1) When the costs are treated as direct costs, they must be approved in advance by the awarding party.

(2) If the costs are specified in the budget, approval of the budget shall constitute approval of the costs.

(3) If the costs are not specified in the budget, or there is no approved budget, the recipient shall obtain specific prior approval in writing from the awarding party. For this purpose the prior approval procedures of §74.102 shall be followed, except that for formula or mandatory grants, ED's written approval may be signed by any authorized ED official.

(c) The awarding party may waive or conditionally waive the requirement for its approval of the costs. Such a waiver shall apply only to the requirement for approval.

If, upon audit or otherwise, it is determined that the costs do not meet other requirements or tests for allowability specified by the applicable cost principles, such as reasonableness and necessity, the costs may be disallowed.

(d) In the case of cost-type contracts, no approval shall be given which is inconsistent with the purpose or the terms of the Federal grant.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-110)

APPENDICES A-E [RESERVED]

(**NOTE:** The following version of Part 74 was published in the *Federal Register* on July 6, 1994 [59 FR 34722] and applies only to discretionary grants and cooperative agreements awarded **on or after** October 1, 1994.)

PART 74-ADMINISTRATION OF GRANTS AND AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NON-PROFIT ORGANIZATIONS

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APPENDIX A-CONTRACT PROVISIONS

AUTHORITY: 20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110, unless otherwise noted.

Subpart A-General

§ 74.1 Purpose.

(a) This part establishes uniform administrative requirements for Federal grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations.

(b) The Secretary does not impose additional or inconsistent requirements, except as provided in §§ 74.4 and 74.14 or unless specifically required by Federal statute or executive order.

(c) This part applies to all recipients other than State and local governments and Indian tribal organizations. Uniform requirements for State and local governments and tribal organizations are in 34 CFR Part 80-Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

(d) Non-profit organizations that implement Federal programs for the States are also subject to State requirements. (20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.2 Definitions.

The following definitions apply to this part:

Accrued expenditures means the charges incurred by the recipient during a given period requiring the provision of funds for-

(1) Goods and other tangible property received;

(2) Services performed by employees, contractors, subrecipients, and other payees; and

(3) Other amounts becoming owed under programs for which no current services or performance is required.

Accrued income means the sum of-

(1) Earnings during a given period from-

(i) Services performed by the recipient; and

(ii) Goods and other tangible property delivered to purchasers; and

(2) Amounts becoming owed to the recipient for which no current services or performance is required by the recipient.

Acquisition cost of equipment means the net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges, such as the cost of installation, transportation, taxes, duty, or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

Advance means a payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

Award means financial assistance that provides support or stimulation to accomplish a public purpose. Awards include grants and other agreements in the form of money or property, in lieu of money, by the Federal Government to an eligible recipient. The term does not include-

(1) Technical assistance, which provides services instead of money;

(2) Other assistance in the form of loans, loan guarantees, interest subsidies, or insurance;

(3) Direct payments of any kind to individuals; and

(4) Contracts which are required to be entered into and administered under procurement laws and regulations.

Cash contributions means the recipient's cash outlay, including the outlay of money contributed to the recipient by third parties.

Closeout means the process by which the Secretary determines that all applicable administrative actions and all required work of the award have been completed by the recipient and Department of Education (ED).

Contract means a procurement contract under an award or subaward, and a procurement subcontract under a recipient's or subrecipient's contract.

Cost sharing or matching means that portion of project or program costs not borne by the Federal Government.

Date of completion means the date on which all work under an award is completed or the date on the award document, or any supplement or amendment thereto, on which Federal sponsorship ends.

Disallowed costs means those charges to an award that the Secretary determines to be unallowable, in accordance with the applicable Federal cost principles or other terms and conditions contained in the award.

Equipment means tangible nonexpendable personal property including exempt property charged directly to the award having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. However, consistent with recipient policy, lower limits may be established.

Excess property means property under the control of ED that is no longer required for its needs or the discharge of its responsibilities.

Exempt property means tangible personal property acquired in whole or in part with Federal funds, where the Secretary has statutory authority to vest title in the recipient without further obligation to the Federal Government. An example of exempt property authority is contained in the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6306) for property acquired under an award to conduct basic or applied research by a non-profit institution of higher education or non-profit organization whose principal purpose is conducting scientific research.

Federal awarding agency means the Federal agency that provides an award to the recipient.

Federal funds authorized means the total amount of Federal funds obligated by the Federal Government for use by the recipient. This amount may include any authorized carryover of unobligated funds from prior funding periods when permitted by ED regulations or ED implementing instructions.

Federal share of real property, equipment, or supplies means that percentage of the property's acquisition costs and any improvement expenditures paid with Federal funds.

Funding period means the period of time when Federal funding is available for obligation by the recipient.

Intangible property and debt instruments means, but is not limited to, trademarks, copyrights, patents and patent applications and such property as loans, notes and other debt instruments, lease agreements, stock, and other instruments of property ownership, whether considered tangible or intangible.

Obligations means the amounts of orders placed, contracts and grants awarded, services received, and similar transactions during a given period that require payment by the recipient during the same or a future period.

Outlays or expenditures means charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applied, and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and other payees, and other amounts becoming owed under programs for which no current services or performance are required.

Personal property means property of any kind except real property. It may be tangible, having physical existence, or intangible, having no physical existence, such as copyrights, patents, or securities.

Prior approval means written approval by an authorized official evidencing prior consent.

Program income means gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award (see exclusions in § 74.24(e) and (h)). Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in ED regulations or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

Project costs means all allowable costs, as established in the applicable Federal cost principles, incurred by a recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

Project period means the period established in the award document during which Federal sponsorship begins and ends.

Property means, unless otherwise stated, real property, equipment, intangible property and debt instruments.

Real property means land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.

Recipient means an organization receiving financial assistance directly from ED to carry out a project or program. The term includes public and private institutions of higher education, public and private hospitals, and other quasi-public and private non-profit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. The term may include commercial organizations, foreign or international organizations (such as agencies of the United Nations) which are recipients, subrecipients, or contractors or subcontractors of recipients or subrecipients at the discretion of the Secretary. The term does not include government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are government-owned or controlled, or are designated as federally-funded research and development centers.

Research and development means all research activities, both basic and applied, and all development activities that are supported at universities, colleges, and other non-profit institutions. "Research" is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. "Development" is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes. The term "research" also includes activities involving the training of individuals in research techniques where these activities utilize the same facilities as other research and development activities and where these activities are not included in the instruction function.

Small awards means a grant or cooperative agreement not exceeding the small purchase threshold fixed at 41 U.S.C. 403(11) (currently $25,000).

Subaward means an award of financial assistance in the form of money, or property in lieu of money, made under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but does not include procurement of goods and services nor does it include any form of assistance which is excluded from the definition of "award" as defined in this section.

Subrecipient means the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided. The term may include foreign or international organizations (such as agencies of the United Nations) at the discretion of the Secretary.

Supplies means all personal property excluding equipment, intangible property, and debt instruments as defined in this section, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement ("subject inventions"), as defined in 37 CFR Part 401-Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements.

Suspension means an action by the Secretary that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the Secretary. Suspension of an award is a separate action from suspension under 34 CFR Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants).

Termination means the cancellation of Federal sponsorship, in whole or in part, under an agreement at any time prior to the date of completion.

Third party in-kind contributions means the value of non-cash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefiting and specifically identifiable to the project or program.

Unliquidated obligations, for financial reports prepared on a cash basis, means the amount of obligations incurred by the recipient that have not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the recipient for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by the Secretary that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

Unrecovered indirect cost means the difference between the amount awarded and the amount which could have been awarded under the recipient's approved negotiated indirect cost rate.

Working capital advance means a procedure whereby funds are advanced to the recipient to cover its estimated disbursement needs for a given initial period.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.3 Effect on other issuances.

For awards subject to this part, all administrative requirements of codified program regulations, program manuals, handbooks, and other nonregulatory materials which are inconsistent with the requirements of this part are superseded, except to the extent they are required by statute, or authorized in accordance with the deviations provision in § 74.4.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.4 Deviations.

The Secretary, after consultation with the Office of Management and Budget (OMB), may grant exceptions for classes of grants or recipients subject to the requirements of this part when exceptions are not prohibited by statute. However, in the interest of maximum uniformity, exceptions from the requirements of this part are permitted only in unusual circumstances. The Secretary may apply more restrictive requirements to a class of recipients when approved by OMB. The Secretary may apply less restrictive requirements when awarding small awards, except for those requirements which are statutory. Exceptions on a case-by-case basis may also be made by the Secretary.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.5 Subawards.

Unless sections of this part specifically exclude subrecipients from coverage, the provisions of this part shall be applied to subrecipients performing work under awards if the subrecipients are institutions of higher education, hospitals, or other non-profit organizations. State and local government subrecipients are subject to the provisions of 34 CFR Part 80-Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

Subpart B-Pre-Award Requirements

§ 74.10 Purpose.

Sections 74.11 through 74.17 prescribes forms and instructions and other pre-award matters to be used in applying for awards.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.11 Pre-award policies.

(a) *Use of Grants and Cooperative Agreements, and Contracts.* In each instance, the Secretary decides on the appropriate award instrument (i.e., grant, cooperative agreement, or contract). The Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301-08) governs the use of grants, cooperative agreements, and contracts. A grant or cooperative agreement shall be used only when the principal purpose of a transaction is to accomplish a public purpose of support or stimulation authorized by Federal statute. The statutory criterion for choosing between grants and cooperative agreements is that for the latter, substantial involvement is expected between ED and the recipient when carrying out the activity contemplated in the agreement. Contracts shall be used when the principal purpose is acquisition of property or services for the direct benefit or use of the Federal Government.

(b) *Public Notice and Priority Setting.* The Secretary notifies the public of intended funding priorities for discretionary grant programs, unless funding priorities are established by Federal statute.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.12 Forms for applying for Federal assistance.

(a) The Secretary complies with the applicable report clearance requirements of 5 CFR Part 1320-Controlling Paperwork Burdens on the Public-with regard to all forms used by ED in place of or as a supplement to the Standard Form 424 (SF-424) series.

(b) Applicants shall use the SF-424 series or those forms and instructions prescribed by the Secretary.

(c) For Federal programs covered by E.O. 12372-Intergovernmental Review of Federal Programs (implemented by the Secretary in 34 CFR Part 79-Intergovernmental Review of Department of Education Programs and Activities)-the applicant shall complete the appropriate sections of the SF-424 (Application for Federal Assistance) indicating whether the application was subject to review by the State Single Point of Contact (SPOC). The name and address of the SPOC for a particular State can be obtained from the Secretary or the Catalog of Federal Domestic Assistance (available from the Superintendent of Documents, Government Printing Office). The SPOC shall advise the applicant whether the program for which application is made has been selected by that State for review.

(d) If ED does not use the SF-424 form, the Secretary may indicate whether the application is subject to review by the State under E.O. 12372.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.13 Debarment and suspension.

The Secretary and recipients shall comply with the nonprocurement debarment and suspension common rule (implemented by the Secretary in 34 CFR Part 85). This common rule restricts subawards and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.14 Special award conditions.

(a) The Secretary may impose special award conditions, if an applicant or recipient-

(1) Has a history of poor performance;

(2) Is not financially stable;

(3) Has a management system that does not meet the standards prescribed in this part;

(4) Has not conformed to the terms and conditions of a previous award; or

(5) Is not otherwise responsible.

(b) If special award conditions are established under paragraph (a) of this section, the Secretary notifies the applicant or recipient of-

(1) The nature of the additional requirements;

(2) The reason why the additional requirements are being imposed;

(3) The nature of the corrective action needed;

(4) The time allowed for completing the corrective actions;
and

(5) The method for requesting reconsideration of the additional requirements imposed.

(c) Any special conditions are promptly removed once the conditions that prompted them have been corrected.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.15 Metric system of measurement.

The Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act (15 U.S.C. 205) declares that the metric system is the preferred measurement system for U.S. trade and commerce. The Act requires each Federal agency to establish a date or dates in consultation with the Secretary of Commerce, when the metric system of measurement will be used in the agency's procurements, grants, and other business-related activities. Metric implementation may take longer where the use of the system is initially impractical or likely to cause significant inefficiencies in the accomplishment of federally-funded activities. The Secretary follows the provisions of E.O. 12770-Metric Usage in Federal Government Programs.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.16 Resource Conservation and Recovery Act.

Under the Resource Conservation and Recovery Act (RCRA) (Pub. L. 94-580 codified at 42 U.S.C. 6962), any State agency or agency of a political subdivision of a State which is using appropriated Federal funds must comply with section 6002 of the RCRA. Section 6002 requires that preference be given in procurement programs to the purchase of specific products containing recycled materials identified in guidelines developed by the Environmental Protection Agency (EPA) (40 CFR Parts 247-254). Accordingly, recipients that receive direct Federal awards or other Federal funds shall give preference in their procurement programs funded with Federal funds to the purchase of recycled products pursuant to the EPA guidelines.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.17 Certifications and representations.

Unless prohibited by statute or codified regulation, the Secretary allows recipients to submit certifications and representations required by statute, executive order, or regulation on an annual basis, if the recipients have ongoing and continuing relationships with ED. Annual certifications and representations shall be signed by responsible officials with the authority to ensure recipients' compliance with the pertinent requirements.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

Subpart C-Post-Award Requirements

FINANCIAL AND PROGRAM MANAGEMENT

§ 74.20 Purpose of financial and program management.

Sections 74.21 through 74.28 prescribe standards for financial management systems, methods for making payments and rules for-

(a) Satisfying cost sharing and matching requirements;

(b) Accounting for program income;

(c) Approving budget revisions;

(d) Making audits;

(e) Determining allowability of cost; and

(f) Establishing fund availability.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.21 Standards for financial management systems.

(a) Recipients shall relate financial data to performance data and develop unit cost information whenever practical.

(b) Recipients' financial management systems shall provide for the following:

(1) Accurate, current, and complete disclosure of the financial results of each federally-sponsored project in accordance with the reporting requirements established in § 74.52. If the Secretary requires reporting on an accrual basis from a recipient that maintains its records on other than an accrual basis, the recipient shall not be required to establish an accrual accounting system.
These recipients may develop accrual data for its reports on the basis of an analysis of the documentation on hand.

(2) Records that identify adequately the source and application of funds for federally-sponsored activities. These records shall contain information pertaining to awards, authorizations, obligations, unobligated balances, assets, outlays, income, and interest.

(3) Effective control over and accountability for all funds, property, and other assets. Recipients shall adequately safeguard all assets and assure they are used solely for authorized purposes.

(4) Comparison of outlays with budget amounts for each award. Whenever appropriate, financial information should be related to performance and unit cost data.

(5) Written procedures to minimize the time elapsing between the transfer of funds to the recipient from the U.S. Treasury and the issuance or redemption of checks, warrants or payments by other means for program purposes by the recipient. To the extent that the provisions of the Cash Management Improvement Act (CMIA) (Pub. L. 101-453) govern, payment methods of State agencies, instrumentalities, and fiscal agents shall be consistent with CMIA Treasury-State Agreements or the CMIA default procedures codified at 31 CFR Part 205-Withdrawal of Cash from the Treasury for Advances under Federal Grant and Other Programs.

(6) Written procedures for determining the reasonableness, allocability, and allowability of costs in accordance with the provisions of the applicable Federal cost principles and the terms and conditions of the award.

(7) Accounting records including cost accounting records that are supported by source documentation.

(c) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, the Secretary may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(d) The Secretary may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government's interest.

(e) Where bonds are required under paragraphs (a) and (b) of this section, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR Part 223-Surety Companies Doing Business with the United States.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.22 Payment.

(a) Payment methods shall minimize the time elapsing between the transfer of funds from the United States Treasury and the issuance or redemption of checks, warrants, or payment by other means by the recipients. Payment methods of State agencies or instrumentalities shall be consistent with Treasury-State CMIA agreements or default procedures codified at 31 CFR Part 205.

(b)(1) Recipients are paid in advance, provided they maintain or demonstrate the willingness to maintain-

(i) Written procedures that minimize the time elapsing between the transfer of funds and disbursement by the recipient; and

(ii) Financial management systems that meet the standards for fund control and accountability as established in § 74.21.

(2) Cash advances to a recipient organization are limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project.

(3) The timing and amount of cash advances are as close as is administratively feasible to the actual disbursements by the recipient organization for direct program or project costs and the proportionate share of any allowable indirect costs.

(c) Whenever possible, advances are consolidated to cover anticipated cash needs for all awards made by the Secretary.

(1) Advance payment mechanisms include, but are not limited to, Treasury check, and electronic funds transfer.

(2) Advance payment mechanisms are subject to 31 CFR Part 205.

(3) Recipients are authorized to submit requests for advances and reimbursements at least monthly when electronic fund transfers are not used.

(d) Requests for Treasury check advance payment shall be submitted on SF-270-Request for Advance or Reimbursement-or other forms as may be authorized by OMB. This form is not to be used when Treasury check advance payments are made to the recipient automatically through the use of a predetermined payment schedule or if precluded by ED instructions for electronic funds transfer.

(e) Reimbursement is the preferred method when the requirements in paragraph (b) of this section cannot be met. The Secretary may also use this method on any construction agreement, or if the major portion of the construction project is accomplished through private market financing or Federal loans, and the Federal assistance constitutes a minor portion of the project.

(1) When the reimbursement method is used, the Secretary makes payment within 30 days after receipt of the billing, unless the billing is improper.

(2) Recipients are authorized to submit request for reimbursement at least monthly

when electronic funds transfers are not used.

(f) If a recipient cannot meet the criteria for advance payments and the Secretary has determined that reimbursement is not feasible because the recipient lacks sufficient working capital, the Secretary may provide cash on a working capital advance basis. Under this procedure, the Secretary advances cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the awardee's disbursing cycle. Thereafter, the Secretary reimburses the recipient for its actual cash disbursements. The working capital advance method of payment is not used for recipients unwilling or unable to provide timely advances to their subrecipient to meet the subrecipient's actual cash disbursements.

(g) To the extent available, recipients shall disburse funds available from repayments to and interest earned on a revolving fund, program income, rebates, refunds, contract settlements, audit recoveries, and interest earned on these funds before requesting additional cash payments.

(h) Unless otherwise required by statute, the Secretary does not withhold payments for proper charges made by recipients at any time during the project period unless-

(1) A recipient has failed to comply with the project objectives, the terms and conditions of the award, or Federal reporting requirements; or (2) The recipient or subrecipient is delinquent in a debt to the United States as defined in OMB Circular A-129-Managing Federal Credit Programs. Under these conditions, the Secretary may, upon reasonable notice, inform the recipient that ED does not make payments for obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated.

(i) The standards governing the use of banks and other institutions as depositories of funds advanced under awards are as follows:

(1) Except for situations described in paragraph (i)(2) of this section, the Secretary does not require separate depository accounts for funds provided to a recipient or establish any eligibility requirements for depositories for funds provided to a recipient. However, recipients must be able to account for the receipt, obligation, and expenditure of funds.

(2) Advances of Federal funds shall be deposited and maintained in insured accounts whenever possible.

(j) Consistent with the national goal of expanding the opportunities for women-owned and minority-owned business enterprises, recipients shall be encouraged to use women-owned and minority-owned banks (a bank which is owned at least 50 percent by women or minority group members).

(k) Recipients shall maintain advances of Federal funds in interest bearing accounts, unless-

(1) The recipient receives less than $120,000 in Federal awards per year;

(2) The best reasonably available interest bearing account would not be expected to earn interest in excess of $250 per year on Federal cash balances; or

(3) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

(l) For those entities where CMIA and its implementing regulations do not apply, interest earned on Federal advances deposited in interest bearing accounts shall be remitted annually to Department of Health and Human Services, Payment Management System, Rockville, MD 20852. Interest amounts up to $250 per year may be retained by the recipient for administrative expense. State universities and hospitals shall comply with CMIA, as it pertains to interest.

If an entity subject to CMIA uses its own funds to pay pre-award costs for discretionary awards without prior written approval from the Secretary, it waives its right to recover the interest under CMIA.

(m) Except as noted elsewhere in this part, only the following forms are authorized for the recipients in requesting advances and reimbursements. The Secretary does not require more than an original and two copies of the following:

(1) SF-270-Request for Advance or Reimbursement. The Secretary adopts the SF-270 as a standard form for all nonconstruction programs when electronic funds transfer or predetermined advance methods are not used. The Secretary may, however, use this form for construction programs in lieu of the SF-271-Outlay Report and Request for Reimbursement for Construction Programs.

(2) SF-271-Outlay Report and Request for Reimbursement for Construction Programs. The Secretary adopts the SF-271 as the standard form to be used for requesting reimbursement for construction programs. However, the Secretary may substitute the SF-270 when the Secretary determines that it provides adequate information to meet Federal needs.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.23 Cost sharing or matching.

(a) All contributions, including cash and third party in-kind, are accepted as part of the recipient's cost sharing or matching when contributions meet the following criteria:

(1) Are verifiable from the recipient's records.

(2) Are not included as contributions for any other federally-assisted project or program.

(3) Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

(4) Are allowable under the applicable cost principles.

(5) Are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.

(6) Are provided for in the approved budget when required by the Secretary.

(7) Conform to other provisions of this part, as applicable.

(b) Unrecovered indirect costs may be included as part of cost sharing or matching only with the prior approval of the Secretary.

(c) Values for recipient contributions of services and property shall be established in accordance with the applicable cost principles. If the Secretary authorizes recipients to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching shall be the lesser of-

(1) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation; or

(2) The current fair market value. However, if there is sufficient justification, the Secretary may approve the use of the current
fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project.

(d) Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services must be consistent with those paid for similar work in the recipient's organization. In those instances in which the required skills are not found in the recipient organization, rates must be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(e) When an employer other than the recipient furnishes the services of an employee, these services shall be valued at the employee's regular rate of pay (plus an amount of fringe benefits that are reasonable, allowable, and allocable, but exclusive of overhead costs), provided these services are in the same skill for which the employee is normally paid.

(f) Donated supplies may include such items as expendable equipment, office supplies, laboratory supplies, or workshop and classroom supplies. Value assessed to donated supplies included in the cost sharing or matching share shall be reasonable and shall not exceed the fair market value of the property at the time of the donation.

(g) The method used for determining cost sharing or matching for donated equipment, buildings, and land for which title passes to the recipient may differ according to the purpose of the award.

(1) If the purpose of the award is to assist the recipient in the acquisition of equipment, buildings or land, the total value of the donated property may be claimed as cost sharing or matching.

(2) If the purpose of the award is to support activities that require the use of equipment, buildings or land, normally only depreciation or use charges for equipment and buildings may be made. However, the full value of equipment or other capital assets and fair rental charges for land may be allowed, provided that the Secretary has approved the charges.

(h) The value of donated property must be determined in accordance with the usual accounting policies of the recipient, with the following qualifications:

(1) The value of donated land and buildings may not exceed its fair market value at the time of donation to the recipient as established by an independent appraiser (e.g., certified real property appraiser or General Services Administration representative) and certified by a responsible official of the recipient.

(2) The value of donated equipment may not exceed the fair market value of equipment of the same age and condition at the time of donation.

(3) The value of donated space may not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment shall not exceed its fair rental value.

(5) The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties:

(i) Volunteer services must be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.

(ii) The basis for determining the valuation for personal service, material, equipment, buildings, and land must be documented.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.24 Program income.

(a) The Secretary applies the standards contained in this section in requiring recipient organizations to account for program income related to projects financed in whole or in part with Federal funds.

(b) Except as provided in paragraph (h) of this section, program income earned during the project period must be retained by the recipient and, in accordance with ED regulations or the terms and conditions of the award, must be used in one or more of the following ways:

(1) Added to funds committed to the project by the Secretary and recipient and used to further eligible project or program objectives.

(2) Used to finance the non-Federal share of the project or program.

(3) Deducted from the total project or program allowable cost in determining the net allowable costs on which the Federal share of costs is based.

(c) When the Secretary authorizes the disposition of program income as described in paragraphs (b)(1) or (b)(2) of this section, program income in excess of any limits stipulated shall be used in accordance with paragraph (b)(3) of this section.

(d) In the event that the Secretary does not specify in program regulations or the terms and conditions of the award how program income is to be used, paragraph (b)(3) of this section applies automatically to all projects or programs except research. For awards that support research, paragraph (b)(1) of this section applies automatically unless the Secretary indicates in the terms and conditions another alternative on the award or the recipient is subject to special award conditions, as indicated in § 74.14.

(e) Unless ED regulations or the terms and conditions of the award provide otherwise, recipients have no obligation to the Federal Government regarding program income earned after the end of the project period.

(f) If authorized by ED or the terms and conditions of the award, costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award.

(g) Proceeds from the sale of property shall be handled in accordance with the requirements of the Property Standards (See §§ 74.30 through 74.37).

(h) Unless ED regulations or the terms and condition of the award provide otherwise, recipients have no obligation to the Federal Government with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. However, Patent and Trademark Amendments (35 U.S.C. 18) apply to inventions made under an experimental, developmental, or research award.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.25 Revision of budget and program plans.

(a) The budget plan is the financial expression of the project or program as approved during the award process. It may include either the Federal and non-Federal share, or only the Federal share, depending upon ED requirements. It shall be related to performance for program evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

(c) For nonconstruction awards, recipients shall request prior approvals from ED for one or more of the following program or budget related reasons:

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or award document.

(3) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(4) The need for additional Federal funding.

(5) The transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa, if approval is required by the Secretary.

(6) The inclusion, unless waived by the Secretary, of costs that require prior approval in accordance with OMB Circular A-21-Cost Principles for Institutions of Higher Education, OMB Circular A-122-Cost Principles for Non-Profit Organizations, or 45 CFR Part 74 Appendix E-Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals, or 48 CFR Part 31-Contract Cost Principles and Procedures, as applicable.

(7) The transfer of funds allotted for training allowances (direct payment to trainees) to other categories of expense.

(8) Unless described in the application and funded in the approved awards, the subaward, transfer or contracting out of any work under an award. This provision does not apply to the purchase of supplies, material, equipment, or general support services.

(d) No other prior approval requirements for specific items are imposed unless a deviation has been approved by OMB.

(e) Except for requirements listed in paragraphs (c)(1) and (c)(4) of this section, the Secretary may waive cost-related and administrative prior written approvals required by this part and OMB Circulars A-21 and A-122. These waivers may authorize recipients to do any one or more of the following:

(1) Incur pre-award costs 90 calendar days prior to award or more than 90 calendar days with the prior approval of the Secretary. All pre-award costs are incurred at the recipient's risk (i.e., the Secretary is under no obligation to reimburse these costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover these costs).

(2)(i) Initiate a one-time extension of the expiration date of the award of up to 12 months unless one or more of the following conditions apply:

(A) The terms and conditions of award prohibit the extension.

(B) The extension requires additional Federal funds.

(C) The extension involves any change in the approved objectives or scope of the project.

(ii) For one-time extensions, the recipient shall notify the Secretary in writing with the supporting reasons and revised expiration date at least 10 days before the expiration date specified in the award. This one-time extension may not be exercised merely for the purpose of using unobligated balances.

(3) Carry forward unobligated balances to subsequent funding periods.

(4) For awards that support research, unless the Secretary provides otherwise in the award or in ED's regulations, the prior approval requirements described in paragraph (e) of this section are automatically waived (i.e., recipients need not obtain prior approvals) unless one of the conditions included in paragraph (e)(2)(i) of this section applies.

(f) The Secretary may restrict the transfer of funds among direct cost categories or programs, functions and activities for awards in which the Federal share of the project exceeds $100,000 and the cumulative amount of the transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by the Secretary. The Secretary does not permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.

(g) All other changes to nonconstruction budgets, except for the changes described in paragraph (j) of this section, do not require prior approval.

(h) For construction awards, recipients shall request prior written approval promptly from the Secretary for budget revisions whenever-

(1) The revision results from changes in the scope or the objective of the project or program;

(2) The need arises for additional Federal funds to complete the project; or

(3) A revision is desired which involves specific costs for which prior written approval requirements may be imposed consistent with applicable OMB cost principles listed in § 74.27.

(i) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(j) When the Secretary makes an award that provides support for both construction and nonconstruction work, the Secretary may require the recipient to request prior approval from the Secretary before making any fund or budget transfers between the two types of work supported.

(k) For both construction and nonconstruction awards, recipients shall notify the Secretary in writing promptly whenever the amount of Federal authorized funds is expected to exceed the needs of the recipient for the project period by more than $5,000 or five percent of the Federal award, whichever is greater. This notification shall not be required if an application for additional funding is submitted for a continuation award.

(l) When requesting approval for budget revisions, recipients shall use the budget forms that were used in the application unless the Secretary indicates a letter of request suffices.

(m) Within 30 calendar days from the date of receipt of the request for budget revisions, the Secretary shall review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the Secretary informs the recipient in writing of the date when the recipient may expect the decision.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.26 Non-Federal audits.

(a) Recipients and subrecipients that are institutions of higher education or other non-profit organizations are subject to the audit requirements contained in OMB Circular A-133-Audits of Institutions of Higher Education and Other Non-Profit Institutions.

(b) State and local governments are subject to the audit requirements contained in the Single Audit Act (31 U.S.C. 7501-7) and the ED regulations implementing OMB Circular A-128-Audits of State and Local Governments.

(c) Hospitals not covered by the audit provisions of OMB Circular A-133 are subject to the audit requirements established by the Secretary.

(d) Commercial organizations are subject to the audit requirements established by the Secretary or the prime recipient as incorporated into the award document.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.27 Allowable costs.

(a) For each kind of recipient, there is a set of cost principles for determining allowable costs. Allowability of costs are determined in accordance with the cost principles applicable to the entity incurring the costs, as specified in the following chart.

(NOTE: OMB circulars are available from the Office of Management and Budget, Publication Office, Room 2200, New Executive Office Building, Washington, DC 20503 (202) 395-7332.)

For the cost of a-	Use the principles in-
Private nonprofit organization other than (1) An institution of higher education; (2) a hospital; or (3) an organization named in OMB Circular A-122 as not subject to that circular.	OMB Circular A-122.
Educational institution	OMB Circular A-21.
Hospital	Appendix E to 45 CFR Part 74.
Commercial for-profit organization other than a hospital and an educational institution.	48 CFR Part 31 Contract Cost Principles and Procedures or uniform cost accounting standards that comply with cost principles acceptable to ED.

(b) The cost principles applicable to a State, a local government, or Federally recognized Indian tribal government are specified at 34 CFR § 80.22.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.28 Period of availability of funds.

Where a funding period is specified, a recipient may charge to the grant only allowable costs resulting from obligations incurred during the funding period and any pre-award costs authorized by the Secretary.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

PROPERTY STANDARDS

§ 74.30 Purpose of property standards.

Sections 74.31 through 74.37 establish uniform standards governing management and disposition of property furnished by ED whose cost was charged to a project supported by a Federal award. Recipients shall observe these standards under awards. The Secretary does not impose additional requirements, unless specifically required by Federal statute. The recipient may use its own property management standards and procedures provided it observes the provisions of §§ 74.31 through 74.37.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.31 Insurance coverage.

Recipients shall, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with Federal funds as provided to property owned by the recipient. Federally-owned property need not be insured unless required by the terms and conditions of the award.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.32 Real property.

The Secretary prescribes requirements for recipients concerning the use and disposition of real property acquired in whole or in part under awards. Unless otherwise provided by statute, the minimum requirements provide the following:

(a) Title to real property must vest in the recipient subject to the condition that the recipient shall use the real property for the authorized purpose of the project as long as it is needed and shall not encumber the property without approval of the Secretary.

(b) The recipient shall obtain written approval by the Secretary for the use of real property in other federally-sponsored projects when the recipient determines that the property is no longer needed for the purpose of the original project. Use in other projects shall be limited to those under federally-sponsored projects (i.e., awards) that have purposes consistent with those authorized for support by the Secretary.

(c) When the real property is no longer needed as provided in paragraphs (a) and (b) of this section, the recipient shall request disposition instructions from ED or its successor Federal awarding agency. The Secretary observes one or more of the following disposition instructions:

(1) The recipient may be permitted to retain title without further obligation to the Federal Government after it compensates the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project.

(2) The recipient may be directed to sell the property under guidelines provided by the Secretary and pay the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). When the recipient is authorized or required to sell the property, proper sales procedures must be established that provide for competition to the extent practicable and result in the highest possible return.

(3) The recipient may be directed to transfer title to the property to the Federal Government or to an eligible third party. The recipient is entitled to compensation for its attributable percentage of the current fair market value of the property.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.33 Federally-owned and exempt property.

(a) Federally-owned property. (1) Title to federally-owned property remains vested in the Federal Government. Recipients shall submit annually an inventory listing of federally-owned property in their custody to the Secretary. Upon completion of the award or when the property is no longer needed, the recipient shall report the property to the Secretary for further ED utilization.

(2) If ED has no further need for the property, it shall be declared excess and reported to the General Services Administration, unless the Secretary has statutory authority to dispose of the property by alternative methods (e.g., the authority provided by the Federal Technology Transfer Act (15 U.S.C. 3710 (I)) to donate research equipment to educational and non-profit organizations in accordance with E.O. 12821-Improving Mathematics and Science Education in Support of the National Education Goals. Appropriate instructions shall be issued to the recipient by the Secretary.

(b) Exempt property. When statutory authority exists, the Secretary may vest title to property acquired with Federal funds in the recipient without further obligation to the Federal Government and under conditions the Secretary considers appropriate. This property is "exempt property." Should the Secretary not establish conditions, title to exempt property upon acquisition vests in the recipient without further obligation to the Federal Government.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.34 Equipment.

(a) Title to equipment acquired by a recipient with Federal funds shall vest in the recipient, subject to conditions of this section.

(b) The recipient may not use equipment acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute, for as long as the Federal Government retains an interest in the equipment.

(c) The recipient shall use the equipment in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds and may not encumber the property without approval of the Secretary. When no longer needed for the original project or program, the recipient shall use the equipment in connection with its other federally-sponsored activities, in the following order of priority:

(1) Activities sponsored by the Federal awarding agency which funded the original project; and then

(2) Activities sponsored by other Federal awarding agencies.

(d) During the time that equipment is used on the project or program for which it was acquired, the recipient shall make it available for use on other projects or programs if other use will not interfere with the work on the project or program for which the equipment was originally acquired. First preference for other use shall be given to other projects or programs sponsored by the Federal awarding agency that financed the equipment; second preference shall be given to projects or programs sponsored by other Federal awarding agencies. If the equipment is owned by the Federal

Government, use on other activities not sponsored by the Federal Government shall be permissible if authorized by the Federal awarding agency. User charges shall be treated as program income.

(e) When acquiring replacement equipment, the recipient may use the equipment to be replaced as trade-in or sell the equipment and use the proceeds to offset the costs of the replacement equipment subject to the approval of the Secretary.

(f) The recipient's property management standards for equipment acquired with Federal funds and federally-owned equipment shall include all of the following:

(1) Equipment records shall be maintained accurately and shall include the following information:

(i) A description of the equipment.

(ii) Manufacturer's serial number, model number, Federal stock number, national stock number, or other identification number.

(iii) Source of the equipment, including the award number.

(iv) Whether title vests in the recipient or the Federal Government.

(v) Acquisition date (or date received, if the equipment was furnished by the Federal Government) and cost.

(vi) Information from which one can calculate the percentage of Federal participation in the cost of the equipment (not applicable to equipment furnished by the Federal Government).

(vii) Location and condition of the equipment and the date the information was reported.

(viii) Unit acquisition cost.

(ix) Ultimate disposition data, including date of disposal and sales price or the method used to determine current fair market value where a recipient compensates ED for its share.

(2) Equipment owned by the Federal Government must be identified to indicate Federal ownership.

(3) A physical inventory of equipment must be taken and the results reconciled with the equipment records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records must be investigated to determine the causes of the difference. The recipient shall, in connection with the inventory, verify the existence, current utilization, and continued need for the equipment.

(4) A control system must be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment. Any loss, damage, or theft of equipment shall be investigated and fully documented; if the equipment was owned by the Federal Government, the recipient shall promptly notify the Secretary.

(5) Adequate maintenance procedures must be implemented to keep the equipment in good condition.

(6) Where the recipient is authorized or required to sell the equipment, proper sales procedures must be established which provide for competition to the extent practicable and result in the highest possible return.

(g) When the recipient no longer needs the equipment, the equipment may be used for other activities in accordance with the following standards:

(1) For equipment with a current per unit fair market value of $5000 or more, the recipient may retain the equipment for other uses provided that compensation is made to ED or its successor. The amount of compensation shall be computed by applying the percentage of Federal participation in the cost of the original project or program to the current fair market value of the equipment.

(2) If the recipient has no need for the equipment, the recipient shall request disposition instructions from the Secretary. The Secretary shall determine whether the equipment can be used to meet ED requirements. If no requirement exists within ED, the availability of the equipment shall be reported to the General Services Administration by the Secretary to determine whether a requirement for the equipment exists in other Federal agencies. The Secretary issues instructions to the recipient no later than 120 calendar days after the recipient's request and the following procedures govern:

(i) If so instructed or if disposition instructions are not issued within 120 calendar days after the recipient's request, the recipient shall sell the equipment and reimburse ED an amount computed by applying to the sales proceeds the percentage of Federal participation in the cost of the original project or program. However, the recipient shall be permitted to deduct and retain from the Federal share $500 or ten percent of the proceeds, whichever is less, for the recipient's selling and handling expenses.

(ii) If the recipient is instructed to ship the equipment elsewhere, the recipient is reimbursed by ED by an amount which is computed by applying the percentage of the recipient's participation in the cost of the original project or program to the current fair market value of the equipment, plus any reasonable shipping or interim storage costs incurred.

(iii) If the recipient is instructed to otherwise dispose of the equipment, the recipient is reimbursed by ED for costs incurred in its disposition.

(iv) The Secretary may reserve the right to transfer the title to the Federal Government or to a third party named by the Federal Government when the third party is otherwise eligible under existing statutes. This transfer shall be subject to the following standards:

(A) The equipment must be appropriately identified in the award or otherwise made known to the recipient in writing.

(B) The Secretary issues disposition instructions within 120 calendar days after receipt of a final inventory. The final inventory must list all equipment acquired with grant funds and federally-owned equipment. If the Secretary does not issue disposition instructions within the 120 calendar day period, the recipient shall apply the standards of this section, as appropriate.

(C) When the Secretary exercises the right to take title, the equipment is subject to the provisions for federally-owned equipment.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.35 Supplies and other expendable property.

(a) Title to supplies and other expendable property shall vest in the recipient upon acquisition. If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other federally-sponsored project or program, the recipient shall retain the supplies for use on non-Federal sponsored activities or sell them, but shall, in either case, compensate the Federal Government for its share. The amount of compensation shall be computed in the same manner as for equipment.

(b) The recipient may not use supplies acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute as long as the Federal Government retains an interest in the supplies.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.36 Intangible property.

(a) The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. ED and any other Federal awarding agency reserve a royalty-free, nonexclusive, and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(b) Recipients are subject to applicable regulations governing patents and inventions, including government-wide regulations issued by the Department of Commerce at 37 CFR Part 401-Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements.

(c) Unless waived by the Secretary, the Federal Government has the right to-

(1) Obtain, reproduce, publish, or otherwise use the data first produced under an award; and

(2) Authorize others to receive, reproduce, publish, or otherwise use these data for Federal purposes.

(d) Title to intangible property and debt instruments acquired under an award or subaward vests upon acquisition in the recipient. The recipient shall use that property for the originally-authorized purpose, and the recipient shall not encumber the property without approval of the Secretary. When no longer needed for the originally authorized purpose, disposition of the intangible property shall occur in accordance with the provisions of § 74.34(g).

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.37 Property trust relationship.

Real property, equipment, intangible property, and debt instruments that are acquired or improved with Federal funds must be held in trust by the recipient as trustee for the beneficiaries of the project or program under which the property was acquired or improved. The Secretary may require recipients to record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with Federal funds and that use and disposition conditions apply to the property.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

PROCUREMENT STANDARDS

§ 74.40 Purpose of procurement standards.

Sections 74.41 through 74.48 contain standards for use by recipients in establishing procedures for the procurement of supplies and other expendable property, equipment, real property, and other services with Federal funds. These standards are designed to ensure that these materials and services are obtained in an effective manner and in compliance with the provisions of applicable Federal statutes and executive orders. The Secretary does not impose additional procurement standards or requirements upon recipients, unless specifically required by Federal statute or executive order or as authorized in §§ 74.4 or 74.14.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.41 Recipient responsibilities.

The standards contained in this section do not relieve the recipient of the contractual responsibilities arising under its contract(s). The recipient is the responsible authority, without recourse to the Secretary, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement. This includes disputes, claims, protests of award, source evaluation, or other matters of a contractual nature. Matters concerning violation of statute are to be referred to Federal, State or local authority that may have proper jurisdiction.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.42 Codes of conduct.

The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. A conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of these standards by officers, employees, or agents of the recipient.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.43 Competition.

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids or requests for proposals shall be excluded from competing for procurements. Awards must be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly establish all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.44 Procurement procedures.

(a) All recipients shall establish written procurement procedures. These procedures must provide for, at a minimum, that-

(1) Recipients avoid purchasing unnecessary items;

(2) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement for the Federal Government; or

(3) Solicitations for goods and services provide for all of the following:

(i) A clear and accurate description of the technical requirements for the material, product, or service to be procured. In competitive procurements, a description shall not contain features which unduly restrict competition.

(ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

(iv) The specific features of brand name or equal descriptions that bidders are required to meet when these items are included in the solicitation.

(v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

(vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment, and are energy efficient.

(b) Positive efforts shall be made by recipients to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of Federal awards shall take all of the following steps to further this goal:

(1) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.

(2) Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.

(3) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

(4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

(5) Use the services and assistance, as appropriate, of organizations such as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

(c) The type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but must be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The "cost-plus-a-percentage-of-cost" or "percentage of construction cost" methods of contracting must not be used.

(d) Contracts are made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration is given to matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources. In certain circumstances, contracts with certain parties are restricted by E.O. 12549 (implemented by the Secretary in 34 CFR Part 85) and E.O. 12689-Debarment and Suspension.

(e) Recipients shall, on request, make available for the Secretary, pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc., when any of the following conditions apply:

(1) A recipient's procurement procedures or operation fails to comply with the procurement standards in this part.

(2) The procurement is expected to exceed the small purchase threshold fixed at 41 U.S.C. 403 (11) (currently $25,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the small purchase threshold, specifies a "brand name" product.

(4) The proposed award over the small purchase threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase threshold.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.45 Cost and price analysis.

Some form of cost or price analysis must be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness,allocability, and allowability.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.46 Procurement records.

Procurement records and files for purchases in excess of the small purchase threshold must include the following at a minimum-

(a) Basis for contractor selection;

(b) Justification for lack of competition when competitive bids or offers are not obtained;

(c) Basis for award cost or price.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.47 Contract administration.

A system for contract administration must be maintained to ensure contractor conformance with the terms, conditions and specifications of the contract, and to ensure adequate and timely follow up of all purchases. Recipients shall evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions, and specifications of the contract.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.48 Contract provisions.

The recipient shall include, in addition to provisions to define a sound and complete agreement, the following provisions in all contracts. The following provisions must also be applied to subcontracts:

(a) Contracts in excess of the small purchase threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for remedial actions as may be appropriate.

(b) All contracts in excess of the small purchase threshold shall contain suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, contracts must describe conditions under which the contract may be terminated for default, as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(c) Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements must provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds $100,000. For those contracts or subcontracts exceeding $100,000, the Secretary may accept the bonding policy and requirements of the recipient, provided the Secretary has made a determination that the Federal Government's interest is adequately protected. If a determination has not been made, the minimum requirements are as follows:

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of his bid, execute contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under a contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(4) Where bonds are required, the bonds must be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR Part 223-Surety Companies Doing Business with the United States.

(d) All negotiated contracts (except those for less than the small purchase threshold) awarded by recipients must include a provision to the effect that the recipient, ED, the Comptroller General of the United States, or any of their duly authorized representatives, must have access to any books, documents, papers and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.

(e) All contracts, including small purchases, awarded by recipients and their contractors must contain the procurement provisions of Appendix A to this part, as applicable.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

REPORTS AND RECORDS

§ 74.50 Purpose of reports and records.

Sections 74.51 through 74.53 establish the procedures for monitoring and reporting on the recipient's financial and program performance and the necessary standard reporting forms. They also establish record retention requirements.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.51 Monitoring and reporting program performance.

(a) Recipients are responsible for managing and monitoring each project, program, subaward, function, or activity supported by the award. Recipients shall monitor subawards to ensure subrecipients have met the audit requirements in § 74.26.

(b) The Secretary prescribes the frequency with which the performance reports shall be submitted. Except as provided in § 74.51(f), performance reports are not required more frequently than quarterly or, less frequently than annually. Annual reports are due 90 calendar days after the grant year; quarterly or semi-annual reports are due 30 days after the reporting period. The Secretary may require annual reports before the anniversary dates of multiple year awards in lieu of these requirements. The final performance reports are due 90 calendar days after the expiration or termination of the award.

(c) If inappropriate, a final technical or performance report is not required after completion of the project.

(d) When required, performance reports must generally contain, for each award, brief information on each of the following:

(1) A comparison of actual accomplishments with the goals and objectives established for the period, the findings of the investigator, or both. Whenever appropriate and the output of programs or projects can be readily quantified, this quantitative data should be related to cost data for computation of unit costs.

(2) Reasons why established goals were not met, if appropriate.

(3) Other pertinent information including, when appropriate, analysis, and explanation of cost overruns or high unit costs.

(e) Recipients are not required to submit more than the original and two copies of performance reports.

(f) Recipients shall immediately notify the Secretary of developments that have a significant impact on the award-supported activities. Also, notification must be given in the case of problems, delays, or adverse conditions which materially impair the ability to meet the objectives of the award. This notification must include a statement of the action taken or contemplated, and any assistance needed to resolve the situation.

(g) The Secretary may make site visits, as needed.

(h) The Secretary complies with the clearance requirements of 5 CFR part 1320 when requesting performance data from recipients.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.52 Financial reporting.

(a) The following forms or other forms as may be approved by OMB are authorized for obtaining financial information from recipients.

(1) SF-269 or SF-269A-Financial Status Report.

(i) Recipients are required to use the SF-269 or SF-269A to report the status of funds for all nonconstruction projects or programs. The Secretary may not require the SF-269 or SF-269A when, the Secretary determines that SF-270-Request for Advance or Reimbursement, or SF-272-Report of Federal Cash Transactions-provides adequate information to meet the Department's needs, except that a final SF-269 or SF-269A is required at the completion of the project when the SF-270 is used only for advances.

(ii) The Secretary prescribes whether the report is on a cash or accrual basis. If the Secretary requires accrual information and the recipient's accounting records are not normally kept on the accrual basis, the recipient is not required to convert its accounting system, but shall develop accrual information through best estimates based on an analysis of the documentation on hand.

(iii) The Secretary determines the frequency of the Financial Status Report for each project or program, considering the size and complexity of the particular project or program. However, the report is not required more frequently than quarterly or less frequently than annually. A final report is required at the completion of the agreement.

(iv) The Secretary requires recipients to submit the SF-269 or SF-269A (an original and no more than two copies) no later than 30 days after the end of each specified reporting period for quarterly and semi-annual reports, and 90 calendar days for annual and final reports. Extensions of reporting due dates may be approved by the Secretary upon request of the recipient.

(2) SF-272-Report of Federal Cash Transactions.

(i) When funds are advanced to recipients the Secretary requires each recipient to submit the SF-272 and, when necessary, its continuation sheet, SF-272a. The Secretary uses this report to monitor cash advanced to recipients and to obtain disbursement information for each agreement with the recipients.

(ii) The Secretary may require forecasts of Federal cash requirements in the "Remarks" section of the report.

(iii) When practical and deemed necessary, the Secretary may require recipients to report in the "Remarks" section the amount of cash advances received in excess of three days. Recipients shall provide short narrative explanations of actions taken to reduce the excess balances.

(iv) Recipients shall be required to submit not more than the original and two copies of the SF-272 15 calendar days following the end of each quarter. The Secretary may require a monthly report from those recipients receiving advances totaling $1 million or more per year.

(v) The Secretary may waive the requirement for submission of the SF-272 for any one of the following reasons:

(A) When monthly advances do not exceed $25,000 per recipient, provided that advances are monitored through other forms contained in this section;

(B) If, in the Secretary's opinion, the recipient's accounting controls are adequate to minimize excessive Federal advances; or

(C) When the electronic payment mechanisms provide adequate data.

(b) When the Secretary needs additional information or more frequent reports, the following shall be observed:

(1) When additional information is needed to comply with legislative requirements, the Secretary shall issue instructions to require recipients to submit information under the "Remarks" section of the reports.

(2) When the Secretary determines that a recipient's accounting system does not meet the standards in § 74.21, additional pertinent information to further monitor

awards may be obtained upon written notice to the recipient until the system is brought up to standard. The Secretary, in obtaining this information, complies with the report clearance requirements of 5 CFR part 1320.

(3) The Secretary may shade out any line item on any report if not necessary.

(4) The Secretary may accept the identical information from the recipients in machine readable format or computer printouts or electronic outputs in lieu of prescribed formats.

(5) The Secretary may provide computer or electronic outputs to recipients when these outputs expedite or contribute to the accuracy of reporting.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.53 Retention and access requirements for records.

(a) This section establishes requirements for record retention and access to records for awards to recipients. The Secretary does not impose any other record retention or access requirements upon recipients.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of five years from the date of submission of the final expenditure report or, for awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, as authorized by the Secretary. The only exceptions are the following:

(1) If any litigation, claim, or audit is started before the expiration of the 5-year period, the records shall be retained until all litigation, claims, or audit findings involving the records have been resolved and final action taken.

(2) Records for real property and equipment acquired with Federal funds shall be retained for 5 years after final disposition.

(3) When records are transferred to or maintained by the Secretary, the 5-year retention requirement is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocations plans, etc. as specified in § 74.53(g).

(c) Copies of original records may be substituted for the original records if authorized by the Secretary.

(d) The Secretary requests transfer of certain records to its custody from recipients when it determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, the Secretary may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) The Secretary, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts, and copies of documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to these documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

(f) Unless required by statute, the Secretary does not place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when the Secretary can demonstrate that the records must be kept confidential and would have been exempted from disclosure pursuant to the

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Freedom of Information Act (5 U.S.C. 552) if the records had belonged to ED.

(g) The starting date for retention of the following types of documents (including supporting records) is specified in paragraphs (g)(1) and (2) of this section: indirect cost rate computations or proposals; cost allocation plans; and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(1) *If submitted for negotiation.* If the recipient submits to the Secretary or the subrecipient submits to the recipient the proposal, plan, or other computation to form the basis for negotiation of the rate, then the 5-year retention period for its supporting records starts on the date of submission.

(2) *If not submitted for negotiation.* If the recipient is not required to submit to the Secretary or the subrecipient is not required to submit to the recipient the proposal, plan, or other computation for negotiation purposes, then the 5-year retention period for the proposal, plan, or other computation and its supporting records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

TERMINATION AND ENFORCEMENT

§ 74.60 Purpose of termination and enforcement.

Sections 74.61 and 74.62 establish uniform suspension, termination, and enforcement procedures.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.61 Termination.

(a) Awards may be terminated in whole or in part only-

(1) By the Secretary, if a recipient materially fails to comply with the terms and conditions of an award;

(2) By the Secretary with the consent of the recipient, in which case the two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) By the recipient, upon sending to the Secretary written notification containing the reasons for the termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if the Secretary determines in the case of partial termination that the reduced or modified portion of the grant will not accomplish the purposes for which the grant was made, it may terminate the grant in its entirety under either paragraphs (a)(1) or (2) of this section.

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in § 74.71(a), including those for property management as applicable, shall be considered in the termination of the award, and provision shall be made for continuing responsibilities of the recipient after termination, as appropriate.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.62 Enforcement.

(a) *Remedies for noncompliance.* If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or notice of award, the Secretary may, in addition to imposing any of the special conditions outlined in § 74.14, take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by the Secretary.

(2) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award.

(4) Withhold further awards for the project or program.

(5) Take other remedies that may be legally available.

(b) *Hearings and appeals.* In taking an enforcement action, the Secretary provides the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of a recipient resulting from obligations incurred by the recipient during a suspension or after termination of an award are not allowable unless the Secretary expressly authorizes them in the notice of suspension or termination or subsequently. Other recipient costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if-

(1) The costs result from obligations which were properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancellable; and

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude ED from initiating a debarment or suspension action against a recipient under 34 CFR Part 85 (see § 74.13).

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

Subpart D-After-the-Award Requirements

§ 74.70 Purpose.

Sections 74.71 through 74.73 contain closeout procedures and other procedures for subsequent disallowances and adjustments.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.71 Closeout procedures.

(a) Recipients shall submit, within 90 calendar days after the date of completion of the award, all financial, performance, and other reports as required by the terms and conditions of the award. The Secretary may approve extensions when requested by the recipient.

(b) Unless the Secretary authorizes an extension, a recipient shall liquidate all obligations incurred under the award not later than 90 calendar days after the funding period or the date of completion as specified in the terms and conditions of the award or in ED implementing instructions.

(c) The Secretary makes prompt payments to a recipient for allowable reimbursable costs under the award being closed out.

(d) The recipient shall promptly refund any balances of unobligated cash that the Secretary has advanced or paid and that is not authorized to be retained by the recipient for use in other projects. OMB

Circular A-129 governs unreturned amounts that become delinquent debts.

(e) When authorized by the terms and conditions of the award, the Secretary makes a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The recipient shall account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §§ 74.31 through 74.37.

(g) In the event a final audit has not been performed prior to the closeout of an award, the Secretary shall retain the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.72 Subsequent adjustments and continuing responsibilities.

(a) The closeout of an award does not affect any of the following:

(1) The right of the Secretary to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements in § 74.26.

(4) Property management requirements in §§ 74.31 through 74.37.

(5) Records retention as required in § 74.53.

(b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of the Secretary and the recipient, provided the responsibilities of the recipient referred to in § 74.73(a), including those for property management as applicable, are considered and provisions made for continuing responsibilities of the recipient, as appropriate.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

§ 74.73 Collection of amounts due.

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government. If not paid within a reasonable period after the demand for payment, the Secretary may reduce the debt by-

(1) Making an administrative offset against other requests for reimbursements;

(2) Withholding advance payments otherwise due to the recipient; or

(3) Taking other action permitted by statute.

(b) Except as otherwise provided by law, the Secretary charges interest on an overdue debt in accordance with 4 CFR Chapter II-Federal Claims Collection Standards.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

APPENDIX A TO PART 74-CONTRACT PROVISIONS

All contracts, awarded by a recipient including small purchases, shall contain the following provisions as applicable:

1. *Equal Employment Opportunity*-All contracts must contain a provision requiring compliance with E.O. 11246-Equal Employment Opportunity, as amended by E.O. 11375-Amending Executive Order 11246 Relating to Equal Employment Opportunity, and as supplemented by regulations at 41 CFR Part 60-Office of Federal Contract

Compliance Programs, Equal Employment Opportunity, Department of Labor.

2. *Copeland "Anti-Kickback" Act (18 U.S.C. 874 and 40 U.S.C. 276c)*-All contracts and subgrants in excess of $2,000 for construction or repair awarded by recipients and subrecipients must include a provision for compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR Part 3-Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all suspected or reported violations to the Federal awarding agency.

3. *Davis-Bacon Act, as amended (40 U.S.C. 276a to a-7)*-When required by Federal program legislation, all construction contracts awarded by the recipients and subrecipients of more than $2,000 shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) and as supplemented by Department of Labor regulations (29 CFR Part 5-Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction). Under this Act, contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less than once a week. The recipient shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The recipient shall report all suspected or reported violations to the Federal awarding agency.

4. *Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333)*-Where applicable, all contracts awarded by recipients in excess of $2,000 for construction contracts and in excess of $2500 for other contracts that involve the employment of mechanics or laborers must include a provision for compliance with Sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333), as supplemented by Department of Labor regulations (29 CFR Part 5). Under Section 102 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

5. *Rights to Inventions Made Under a Contract or Agreement*-Contracts or agreements for the performance of experimental, developmental, or research work must provide for the rights of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR Part 401-Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative

Agreements, and any implementing regulations issued by the awarding agency.

6. *Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), as amended*-Contracts and subgrants of amounts in excess of $100,000 shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders, or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 et seq.). Violations shall be reported to ED and the Regional Office of the Environmental Protection Agency (EPA).

7. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)*-Contractors who apply or bid for an award of $100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant, or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. The disclosures are forwarded from tier to tier up to the recipient.

8. *Debarment and Suspension (E.O. 12549 and E.O. 12689)*-No contract may be made to parties listed on the General Services Administration's List of Parties Excluded from Federal Procurement or Nonprocurement Programs in accordance with E.O 12549 and E.O. 12689-Debarment and Suspension. This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than E.O. 12549.

Contractors with awards that exceed the small purchase threshold must provide the required certification regarding its exclusion status and that of its principal employees.

(20 U.S.C. 1221e-3(a)(1) and 3474; OMB Circular A-110)

(**NOTE:** The following version of Part 75 incorporates amendments to that part published in the *Federal Register* on June 10, 1994 [59 FR 30258]).

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SOURCE: 45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, unless otherwise noted.

Subpart A-General

REGULATIONS THAT APPLY TO DIRECT GRANT PROGRAMS

§ 75.1 Programs to which part 75 applies.

(a) The regulations in part 75 apply to each direct grant program of the Department of Education.

(b) If a direct grant program does not have implementing regulations, the Secretary implements the program under the authorizing statute and, to the extent consistent with the authorizing statute, under the General Education Provisions Act and the regulations in this part. For the purposes of this part, the term "direct grant program" includes any grant program of the Department other than a program whose authorizing statute or implementing regulations provide a formula for allocating program funds among eligible States. With respect to Public Law 81-874 (the Impact Aid Program), the term "direct grant program" includes only the entitlement increase for children with disabilities under section 3(d)(2)(C) of Public Law 81-874 (20 U.S.C. 238(d)(2)(C) and disaster assistance under section 7 of that law (20 U.S.C. 241-1).

NOTE: See part 76 for the general regulations that apply to programs that allocate funds among eligible States. See §75.101(c) for a description of the information in the application notice for a discretionary grant program that does not have regulations. For a description of the two kinds of direct grant programs see §75.200(b) for a description of a discretionary grant program and §75.200(c) for a description of a formula grant program. Also see §75.210 for the selection criteria for discretionary grant programs that do not have regulations.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980, as amended at 45 FR 28669, Apr. 29, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 84059, Dec. 22, 1980, 50 FR 29330, July 18, 1985; 52 FR 27803, July 24, 1987; 57 FR 30336, July 8, 1992]

§ 75.2 Exceptions in program regulations to part 75.

If a program has regulations that are not consistent with part 75, the implementing regulations for that program identify the sections of part 75 that do not apply.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.4 Department contracts.

(a) A Federal contract made by the Department is governed by-

(1) Chapters 1 and 34 of Title 48 of the Code of Federal Regulations (Federal Acquisition Regulation and Education Department Acquisition Regulation).

(2) Any applicable program regulations, and

(3) The request for proposals for the procurement, if any, referenced in *Commerce Business Daily*.

(b) The regulations in part 75 do not apply to a contract of the Department unless regulations in part 75 or a program's regulations specifically provide otherwise.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 57 FR 30336, July 8, 1992]

ELIGIBILITY FOR A GRANT

§ 75.50 How to find out whether you are eligible.

Eligibility to apply for a grant under a program of the Department is governed by the authorizing statute and implementing regulations for that program.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27803, July 24, 1987]

§ 75.51 How to prove nonprofit status.

(a) Under some programs, an applicant must show that it is a nonprofit organization. (See the definition of "nonprofit" in 34 CFR part 77.1.)

(b) An applicant may show that it is a nonprofit organization by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under Section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a State taxing body or the State attorney general certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may lawfully benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar

document if it clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (b) (1) through (3) of this section if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

INELIGIBILITY OF CERTAIN INDIVIDUALS TO RECEIVE ASSISTANCE

SOURCE: Sections 75.60-75.62 issued at 57 FR 30337, July 8, 1992, unless otherwise noted.

§ 75.60 Individuals ineligible to receive assistance.

(a) An individual is ineligible to receive a fellowship, scholarship, or discretionary grant funded by the Department if the individual-

(1) Is not current in repaying a debt or is in default, as that term is used in 34 CFR part 668, on a debt-

(i) Under a program listed in paragraph (b) of this section; or

(ii) To the Federal Government under a nonprocurement transaction; and

(2) Has not made satisfactory arrangements to repay the debt.

(b) An individual who is not current in repaying a debt, or is in default, as that term is used in 34 CFR part 668, on a debt under a fellowship, scholarship, discretionary grant, or loan program, as included in the following list, and who has not made satisfactory arrangements to repay the debt, is ineligible under paragraph (a) of this section:

(1) A grant awarded under the Pell Grant (20 U.S.C. 1070a, *et seq.*), Supplemental Educational Opportunity Grant (SEOG) (20 U.S.C. 1070b, *et seq.*), or State Student Incentive Grant (SSIG) (20 U.S.C. 1070c, *et seq.*) program, or a scholarship awarded under the Robert C. Byrd Honors Scholarship Program (20 U.S.C. 1070d-31, *et seq.*), a fellowship awarded under the Jacob K. Javits Fellows Program (20 U.S.C. 1134h-1134k), or a fellowship awarded under the Patricia Roberts Harris Fellowship Program (20 U.S.C. 1134d-1134f).

(2) A fellowship awarded under the Christa McAuliffe Fellowship Program (20 U.S.C. 1113-1113e), the Bilingual Education Fellowship Program (20 U.S.C. 3221-3262), or the Rehabilitation Long-Term Training Program (29 U.S.C. 774(b)).

(3) A loan made under the Perkins Loan Program (20 U.S.C. 1087aa, *et seq.*), the Income Contingent Direct Loan Demonstration Project (20 U.S.C. 1087a, *et seq.*), the Stafford Loan Program, Supplemental Loans for Students (SLS), PLUS, or Consolidation Loan Program (20 U.S.C. 1071, *et seq.*), or the Cuban Student Loan Program (22 U.S.C. 2601, *et seq.*).

(4) A scholarship or repayment obligation incurred under the Paul Douglas Teacher Scholarship Program (20 U.S.C. 1111, *et seq.*).

(5) A grant, or a loan, made under the Law Enforcement Education Program (42 U.S.C. 3775).

(6) A stipend awarded under the Indian Fellowship Program (29 U.S.C. 774(b)).

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.61 Certification of eligibility; effect of ineligibility.

(a) An individual who applies for a fellowship, scholarship, or discretionary grant from the Department shall provide with his or her application a certification under the penalty of perjury-

(1) That the individual is eligible under §75.60; and

(2) That the individual has not been debarred or suspended by a judge under section 5301 of the Anti-Drug Abuse Act of 1988 (21 U.S.C. 853a).

(b) The Secretary specifies the form of the certification required under paragraph (a) of this section.

(c) The Secretary does not award a fellowship, scholarship, or discretionary grant to an individual who-

(1) Fails to provide the certification required under paragraph (a) of this section; or

(2) Is ineligible, based on information available to the Secretary at the time the award is made.

(d) If a fellowship, scholarship, or discretionary grant is made to an individual who provided a false certification under paragraph (a) of this section, the individual is liable for recovery of the funds made available under the certification, for civil damages or penalties imposed for false representation, and for criminal prosecution under 18 U.S.C. 1001.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.62 Requirements applicable to entities making certain awards.

(a) An entity that provides a fellowship, scholarship, or discretionary grant to an individual under a grant from, or an agreement with, the Secretary shall require the individual who applies for such an award to provide with his or her application a certification under the penalty of perjury-

(1) That the individual is eligible under §75.60; and

(2) That the individual has not been debarred or suspended by a judge under section 5301 of the Anti-Drug Abuse Act of 1988 (21 U.S.C. 853a).

(b) An entity subject to this section may not award a fellowship, scholarship, or discretionary grant to an individual if-

(1) The individual fails to provide the certification required under paragraph (a) of this section; or

(2) The Secretary informs the entity that the individual is ineligible under §75.60.

(c) If a fellowship, scholarship, or discretionary grant is made to an individual who provided a false certification under paragraph (a) of this section, the individual is liable for recovery of the funds made available under the certification, for civil damages or penalties imposed for false representation, and for criminal prosecution under 18 U.S.C. 1001.

(d) The Secretary may require an entity subject to this section to provide a list of the individuals to whom fellowship, scholarship, or discretionary grant awards have been made or are proposed to be made by the entity.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474

Subpart B-[Reserved]

Subpart C-How To Apply for a Grant

THE APPLICATION NOTICE

§ 75.100 Publication of an application notice; content of the notice.

(a) Each fiscal year the Secretary publishes application notices in the *Federal Register* that explain what kind of assistance is available for new grants under the programs that the Secretary administers.

(b) The application notice for a program explains one or more of the following:

(1) How to apply for a new grant.

(2) If preapplications are used under the program, how to preapply for a new grant.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86297, Dec. 30, 1980; 51 FR 20824, June 9, 1986]

§ 75.101 Information in the application notice that helps an applicant apply.

(a) The Secretary may include such information as the following in an application notice:

(1) How an applicant can get an application package that contains:

(i) Information about the program; and

(ii) The application form that the applicant must use.

(2) The amount of funds available for grants and the estimated number and amounts of those grants.

(3) If the Secretary plans to approve multi-year projects, the project period that will be approved.

(4) Any priorities established by the Secretary for the program for that year and the method the Secretary will use to implement the priorities. (See §75.105 *Annual priorities*.)

(5) Where to find the regulations that apply to the program.

(6) The statutory authority for the program.

(7) The deadlines established under §75.102 (Deadline date for applications.) and 34 CFR part 79.8 (How does the Secretary provide States an opportunity to comment on proposed Federal financial assistance?)

(b) If the Secretary either requires or permits preapplications under a program, an application notice for the program explains how an applicant can get the preapplication form.

(c) If a discretionary grant program does not have implementing regulations, the application notice describes:

(1) The purposes of the statute that authorizes the program;

(2) The needs recognized in the authorizing statute;

(3) Other interpretations of the statute adopted by the Secretary that significantly affect the administration of the program;

(4) Inconsistencies, if any, between the authorizing statute and the General Education Provisions Act or the regulations in this part;

(5) How the criteria in §75.210 of EDGAR apply to an application; and

(6) How the Secretary will distribute the points reserved under §74.210(c).

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 84059, Dec. 22, 1980; 46 FR 3205, Jan. 14, 1981; 51 FR 20824, June 9, 1986; 51 FR 21164, June 11, 1986]

CROSS-REFERENCE: See 34 CFR 77.1-definitions of "budget period" and "project period."

§ 75.102 Deadline date for applications.

(a) The application notice for a program sets a deadline date for applications to be mailed or hand delivered to the Department.

(b) If an applicant wants a new grant, the applicant shall:

(1) Mail the application to the address specified in the application notice on or before the deadline date; or

(2) Hand deliver the application to the address specified in the application notice by 4:30 p.m. (Washington, D.C. time) on the deadline date.

(c) [Reserved]

(d) An applicant must show one of the following as proof of mailing:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary.

(e) If an application is mailed through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

NOTE: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

[45 FR 22497, Apr. 3, 1980, as amended at 51 FR 20824, June 9, 1986]

§ 75.103 Deadline date for preapplications.

(a) If the Secretary invites or requires preapplications under a program, the application notice for the program sets a deadline date for preapplications.

(b) An applicant shall submit its preapplication in accordance with the procedures for applications in §75.102(b) and (d).

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.104 Applicants must meet procedural rules.

The Secretary may make a grant only to an eligible party that submits an application.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.105 Annual priorities.

(a) *What programs are covered by this section?* This section applies to any program for which the Secretary establishes priorities for selection of applications in a particular fiscal year.

(b) *How does the Secretary establish annual priorities?*

(1) The Secretary establishes final annual priorities by publishing the priorities in a notice in the *Federal Register*, usually in the application notice for that program.

(2) The Secretary publishes proposed annual priorities for public comment, unless:

(i) The final annual priorities will be implemented only by inviting applications that meet the priorities (Cross-reference: See 34 CFR 75.105(c)(1));

(ii) The final annual priorities are chosen from a list of priorities already established in the program's regulations; or

(iii) Publishing proposed annual priorities would seriously interfere with an orderly, responsible grant award process or would otherwise be impracticable, unnecessary, or contrary to the public interest.

(c) *How does the Secretary implement an annual priority?*

The Secretary may choose one or more of the following methods to implement an annual priority:

(1) *Invitations.* The Secretary may simply invite applications that meet a priority. If the Secretary chooses this method, an application that meets the priority receives no competitive or absolute preference over applications that do not meet the priority.

(2) *Competitive preference.* The Secretary may give one of the following kinds of competitive preference to applications that meet a priority.

(i) If a program uses weighted selection criteria, the Secretary may award bonus points to an application that meets the priority. These points are in addition to any points the applicant earns under the selection criteria (see §75.200(b)). The notice states the maximum number of additional points that the Secretary may award to an application depending upon how well the application meets the priority.

(ii) The Secretary may select an application that meets a priority over an application of comparable merit that does not meet the priority.

(3) *Absolute preference.* The Secretary may give an absolute preference to applications that meet a priority. The Secretary establishes a separate competition for applications that meet the priority and reserves all or part of a program's funds solely for that competition. The Secretary may adjust the amount reserved for the priority after determining the number of high quality applications received.

(Authority: 20 U.S.C. 3474)

[46 FR 3205, Jan. 14, 1981, as amended at 57 FR 30337, July 8, 1992]

APPLICATION CONTENTS

CROSS-REFERENCE: See §75.200 for a description of discretionary and formula grant programs.

§ 75.109 Changes to application; number of copies.

(a) Each applicant shall submit an original and two copies of its application to the Department, including any information that the applicant supplies voluntarily.

(b) An applicant may make changes to its application on or before the deadline date for submitting applications under the program.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

CROSS-REFERENCE: See §75.200 How applications for new grants are selected for funding.

§ 75.112 Include a proposed project period and a timeline.

(a) An application must propose a project period for the project.

(b) An application must include a narrative that describes how and when, in each budget period of the project, the applicant plans to meet each objective of the project.

(Approved by the Office of Management and Budget under control number 1875-0102)

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.117 Information needed for a multi-year project.

An applicant that proposes a multi-year project shall include in its application:

(a) Information that shows why a multi-year project is needed;

(b) A budget narrative accompanied by a budget form prescribed by the Secretary, that provides budget information for each budget period of the proposed project period.

(Approved by the Office of Management and Budget under control number 1875-0102)

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.118 Requirements for a continuation award.

(a) A recipient that wants to receive a continuation award shall submit a performance report that provides the most current performance and financial expenditure information, as directed by the Secretary, that is sufficient to meet the reporting requirements of 34 CFR 74.82, 75.590, 75.720, and 80.40.

(b) If a recipient fails to submit a performance report that meets the requirements of paragraph (a) of this section, the Secretary denies continued funding for the grant.

CROSS-REFERENCE: See § 75.117 Information needed for a multi-year project, and §§ 75.250 through 75.253 Approval of multi-year projects, § 75.590 Evaluation by the recipient, § 75.720 Financial and performance reports, § 74.82 Performance Reports under nonconstruction grants, and § 80.40 Monitoring and reporting program performance.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.119 Information needed if private school students participate.

If a program requires the applicant to provide an opportunity for participation of students enrolled in private schools, the application must include the information required of subgrantees under 34 CFR 76.656.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980 and amended at 53 FR 49143, Dec. 6, 1988]

SEPARATE APPLICATIONS-ALTERNATIVE PROGRAMS

§ 75.125 Submit a separate application to each program; exception under the Joint Funding Simplification Act.

An applicant shall submit a separate application to each program under which it wants a grant.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27803, July 24, 1987]

§ 75.126 Application must list all programs to which it is submitted.

If an applicant is submitting an application for the same project under more than one Federal program, the applicant shall list these programs in its application. The Secretary uses this information to avoid duplicate grants for the same project.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

GROUP APPLICATIONS

§ 75.127 Eligible parties may apply as a group.

(a) Eligible parties may apply as a group for a grant.

(b) Depending on the program under which a group of eligible parties seeks assistance, the term used to refer to the group may vary. The list that follows contains some of the terms used to identify a group of eligible parties:

(1) Combination of institutions of higher education.
(2) Consortium.
(3) Joint applicants.
(4) Cooperative arrangements.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.128 Who acts as applicant; the group agreement.

(a) If a group of eligible parties applies for a grant, the members of the group shall either:

(1) Designate one member of the group to apply for the grant; or

(2) Establish a separate, eligible legal entity to apply for the grant.

(b) The members of the group shall enter into an agreement that:

(1) Details the activities that each member of the group plans to perform; and

(2) Binds each member of the group to every statement and assurance made by the applicant in the application.

(c) The applicant shall submit the agreement with its application.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.129 Legal responsibilities of each member of the group.

(a) If the Secretary makes a grant to a group of eligible applicants, the applicant for the group is the grantee and is legally responsible for:

(1) The use of all grant funds; and

(2) Ensuring that the project is carried out by the group in accordance with Federal requirements.

(b) Each member of the group is legally responsible to:

(1) Carry out the activities it agrees to perform; and

(2) Use the funds that it receives under the agreement in accordance with Federal requirements that apply to the grant.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

STATE COMMENT PROCEDURES

§ 75.155 Review procedures if State may comment on applications: purpose of §§75.156-75.158.

If the authorizing statute for a program requires that a specific State agency be given an opportunity to comment on each application, the State and the applicant shall use the procedures in §§75.156-75.158 for that purpose.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

CROSS-REFERENCE: See 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities) for the regulations implementing the application review procedures that States may use under E.O. 12372.

[57 FR 30338, July 8, 1992]

§ 75.156 When an applicant under §75.155 must submit its application to the State; proof of submission.

(a) Each applicant under a program covered by §75.155 shall submit a copy of its application to the State on or before the deadline date for submitting its application to the Department.

(b) The applicant shall attach to its application a copy of its letter that requests the State to comment on the application.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.157 The State reviews each application.

A State that receives an application under §75.156 may review and comment on the application.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.158 Deadlines for State comments.

(a) The Secretary may establish a deadline date for receipt of State comments on applications.

(b) The State shall make its comments in a written statement signed by an appropriate State official.

(c) The appropriate State official shall submit comments to the Secretary by the deadline date for State comments. The procedures in §75.102 (b) and (d) (how to meet a deadline) of this part apply to this submission.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.159 Effect of State comments or failure to comment.

(a) The Secretary considers those comments of the State that relate to:

(1) Any selection criterion that applies under the program; or

(2) Any other matter that affects the selection of projects for funding under the program.

(b) If the State fails to comment on an application on or before the deadline date for the appropriate program, the State waives its right to comment.

(c) If the applicant does not give the State an opportunity to comment, the Secretary does not select that project for a grant.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

DEVELOPMENT OF CURRICULA OR INSTRUCTIONAL MATERIALS

§ 75.190 Consultation.

Each applicant that intends to develop curricula or instructional materials under a grant is encouraged to assure that the curricula or materials will be developed in a manner conducive to dissemination, through continuing consultations with publishers, personnel of State and local educational agencies, teachers, administrators, community representatives, and other individuals experienced in dissemination.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.191 Consultation costs.

An applicant may budget reasonable consultation fees or planning costs in connection with the development of curricula or instructional materials.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.192 Dissemination.

If an applicant proposes to publish and disseminate curricula or instructional materials under a grant, the applicant shall include an assurance in its application that the curricula or materials will reach the populations for which the curricula or materials were developed.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

Subpart D-How Grants Are Made

SELECTION OF NEW PROJECTS

§ 75.200 How applications for new grants and cooperative agreements are selected for funding; standards for use of cooperative agreements.

(a) *Direct grant programs.* The Department administers two kinds of direct grant programs. A direct grant program is either a discretionary grant or a formula grant program.

(b) *Discretionary grant programs.* (1) A discretionary grant program is one that permits the Secretary to use discretionary judgment in selecting applications for funding.

CROSS-REFERENCE: See §75.219 Exceptions to the procedures under §75.217.

(2) The Secretary uses selection criteria to evaluate the applications submitted for new grants under a discretionary grant program.

(3) If a program does not have regulations, the Secretary uses the selection criteria in §75.210 to select grantees under the program.

(4) The Secretary may award a cooperative agreement instead of a grant if the Secretary determines that substantial involvement between the Department and the recipient is necessary to carry out a collaborative project.

(5) The Secretary uses the selection procedures in this subpart to select recipients of cooperative agreements.

(c) *Formula grant programs.* (1) A formula grant program is one that entitles certain applicants to receive grants if they meet the requirements of the program. Applicants do not compete with each other for the funds, and each grant is either for a set amount or for an amount determined under a formula.

(2) The Secretary applies the program statute and regulations to fund projects under a formula grant program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27803, July 24, 1987; 57 FR 30338, July 8, 1992]

§ 75.201 How to use the selection criteria.

(a) *Unweighted criteria.* If the selection criteria for a program are not weighted, the Secretary evaluates each criterion equally.

(b) *Weighted criteria.* If the selection criteria for a program are weighted, the Secretary assigns in the program regulations a total number of points that an applicant may receive under all of the criteria.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27803, July 24, 1987]

§§ 75.202-75.206 [Reserved]

§ 75.210 Selection criteria for a discretionary grant program that does not have regulations.

(a) *How this section works.* (1) If a discretionary grant program does not have implementing regulations, the Secretary uses the criteria in this section to evaluate applications for new grants under the program.

(2) The maximum score for all of the criteria in this section is 100 points.

(3) Subject to paragraph (c) of this section, the maximum score for each criterion is indicated in parentheses with the criterion.

(b) *The criteria*-(1) *Meeting the purposes of the authorizing statute.* (30 points) The Secretary reviews each application to determine how well the project will meet the purpose of the statute that authorizes the program, including consideration of:

(i) The objectives of the project; and

(ii) How the objectives of the project further the purposes of the authorizing statute.

(2) *Extent of need for the project.* (20 points) The Secretary reviews each application to determine the extent to which the project meets specific needs recognized in the statute that authorizes the program, including consideration of:

(i) The needs addressed by the project;

(ii) How the applicant identified those needs;

(iii) How those needs will be met by the project; and

(iv) The benefits to be gained by meeting those needs.

(3) *Plan of operation.* (15 points) The Secretary reviews each application to determine the quality of the plan of operation for the project, including:

(i) The quality of the design of the project;

(ii) The extent to which the plan of management is effective and ensures proper and efficient administration of the project;

(iii) How well the objectives of the project relate to the purpose of the program;

(iv) The quality of the applicant's plan to use its resources and personnel to achieve each objective;

(v) How the applicant will ensure that project participants who are otherwise eligible to participate are selected without regard to race, color, national origin, gender, age, or handicapping condition; and

(vi) For grants under a program that requires the applicant to provide an opportunity for participation of students enrolled in private schools, the quality of the applicant's plan to provide that opportunity.

(4) *Quality of key personnel.* (7 points)

(i) The Secretary reviews each application to determine the quality of key personnel the applicant plans to use on the project, including:

(A) The qualifications of the project director (if one is to be used);

(B) The qualifications of each of the other key personnel to be used in the project;

(C) The time that each person referred to in paragraphs (b)(4)(i) (A) and (B) of this section will commit to the project; and

(D) How the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or handicapping condition.

(ii) To determine personnel qualifications under paragraphs (b)(4)(i) (A) and (B) of this section, the Secretary considers:

(A) Experience and training in fields related to the objectives of the project; and

(B) Any other qualifications that pertain to the quality of the project.

(5) *Budget and cost effectiveness.* (5 points) The Secretary reviews each application to determine the extent to which:

(i) The budget is adequate to support the project; and

(ii) Costs are reasonable in relation to the objectives of the project.

(6) *Evaluation plan.* (5 points) The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation:

(i) Are appropriate to the project; and

(ii) To the extent possible, are objective and produce data that are quantifiable.

(Cross-reference: See 34 CFR 75.590 Evaluation by the grantee.)

(7) *Adequacy of resources.* (3 points) The Secretary reviews each application to determine the adequacy of the resources that the applicant plans to devote to the project, including facilities, equipment, and supplies.

(c) *Weighting the criteria.* (15 points) The Secretary distributes an additional 15 points among the criteria listed in paragraph (b) of this section. The Secretary indicates in the application notice for the program how these 15 points are distributed.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[52 FR 27803, July 24, 1987, as amended at 53 FR 49143, Dec. 6, 1988]

SELECTION PROCEDURES

§ 75.215 How the Department selects a new project: purpose of §§75.216-75.222.

Sections 75.216-75.222 describe the process the Secretary uses to select applications for new grants. All of these sections apply to a discretionary grant program. However, only §75.216 applies also to a formula grant program.

CROSS-REFERENCE. See §75.200(b) Discretionary grant program, and (e) Formula grant program.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.216 Applications not evaluated for funding.

The Secretary does not evaluate an application if-

(a) The applicant is not eligible;

(b) The applicant does not comply with all of the procedural rules that govern the submission of the application;

(c) The application does not contain the information required under the program, or

(d) The proposed project cannot be funded under the authorizing statute or implementing regulations for the program.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[57 FR 30338, July 8, 1992]

§ 75.217 How the Secretary selects applications for new grants.

(a) The Secretary selects applications for new grants on the basis of the authorizing statute, the selection criteria, and any priorities or other requirements that have been published in the *Federal Register* and apply to the selection of those applications.

(b)(1) The Secretary may use experts to evaluate the applications submitted under a program.

(2) These experts may include persons who are not employees of the Federal Government.

(c) The Secretary prepares a rank order of the applications based solely on the evaluation of their quality according to the selection criteria.

(d) The Secretary then determines the order in which applications will be selected for grants. The Secretary considers the following in making these determinations:

(1) The information in each application.

(2) The rank ordering of the applications.

(3) Any other information relevant to a criterion, priority, or other requirement that applies to the selection of applications for new grants, including information concerning the applicant's use of funds under a previous award under the same Federal program.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[52 FR 27804, July 24, 1987]

§ 75.218 Applications not evaluated or selected for funding.

(a) The Secretary informs an applicant if its application-

(1) Is not evaluated, or

(2) Is not selected for funding.

(b) If an applicant requests an explanation of the reason its application was not evaluated or selected, the Secretary provides that explanation.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[57 FR 30338, July 8, 1992]

§ 75.219 Exceptions to the procedures under §75.217.

The Secretary may select an application for funding without following the procedures in §75.217 if:

(a) The objectives of the project cannot be achieved unless the Secretary makes the grant before the date grants can be made under the procedures in §75.217; or

(b)(1) The application was evaluated under the preceding competition of the program;

(2) The application rated high enough to deserve selection under §75.217; and

(3) The application was not selected for funding because the application was mishandled by the Department.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27804, July 24, 1987]

§ 75.220 Procedures the Department uses under §75.219(a).

If the special circumstances of §75.219(a) appear to exist for an application, the Secretary uses the following procedures:

(a) The Secretary assembles a board to review the application.

(b) The board consists of:

(1) A program officer of the program under which the applicant wants a grant;

(2) A Department grants officer; and

(3) A Department employee who is not a program officer of the program but who is qualified to evaluate the application.

(c) The board reviews the application to decide if:

(1) The special circumstances under §75.219(a) are satisfied;

(2) The application rates high enough, based on the selection criteria, priorities, and other requirements that apply to the program, to deserve selection; and

(3) Selection of the application will not have an adverse impact on the budget of the program.

(d) The board forwards the results of its review to the Secretary.

(e) If each of the conditions in paragraph (c) of this section is satisfied, the Secretary may select the application for funding.

(f) Even if the Secretary does not select the application for funding, the applicant may submit its application under the procedures in Subpart C of this part.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86297, Dec. 30, 1980]

§ 75.222 Procedures the Department uses under §75.219(b).

If the special circumstances of §75.219(b) appear to exist for an application, the Secretary may select the application for funding if:

(a) The Secretary has documentary evidence that the special circumstances of §75.219(b) exist, and

(b) The Secretary has a statement that explains the circumstances of the mishandling.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27804, July 24, 1987]

PROCEDURES TO MAKE A GRANT

§ 75.230 How the Department makes a grant; purpose of §§75.231-75.236.

If the Secretary selects an application under §§75.217, 75.220, or 75.222, the Secretary follows the procedures in §§75.231-75.236 to set the amount and determine the conditions of a grant. Sections 75.235-75.236 also apply to grants under formula grant programs.

CROSS-REFERENCE: See §75.200 How applications for new grants are selected for funding.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.231 Additional information.

After selecting an application for funding, the Secretary may require the applicant to submit additional information.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.232 The cost analysis; basis for grant amount.

(a) Before the Secretary sets the amount of a new grant, the Secretary does a cost analysis of the project. The Secretary:

(1) Verifies the cost data in the detailed budget for the project;

(2) Evaluates specific elements of costs; and

(3) Examines costs to determine if they are necessary, reasonable, and allowable under applicable statutes and regulations.

(b) The Secretary uses the cost analysis as a basis for determining the amount of the grant to the applicant. The cost analysis shows whether the applicant can achieve the objectives of the project with reasonable efficiency and economy under the budget in the application.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.233 Setting the amount of the grant.

(a) Subject to any applicable matching or cost-sharing requirements, the Secretary may fund up to 100 percent of the allowable costs in the applicant's budget.

(b) In deciding what percentage of the allowable costs to fund, the Secretary may consider any other financial resources available to the applicant.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[57 FR 30338, July 8, 1992]

§ 75.234 The conditions of the grant.

(a) The Secretary makes a grant to an applicant only after determining-

(1) The approved costs; and

(2) Any special conditions.

(b) In awarding a cooperative agreement, the Secretary includes conditions that state the explicit character and extent of anticipated collaboration between the Department and the recipient.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[57 FR 30338, July 8, 1992]

§ 75.235 The notification of grant award.

(a) To make a grant, the Secretary issues a notification of grant award and sends it to the grantee.

(b) The notification of grant award sets the amount of the grant award and establishes other specific conditions, if any.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 57 FR 30338, July 8, 1992]

§ 75.236 Effect of the grant.

The grant obligates both the Federal Government and the grantee to the requirements that apply to the grant.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

CROSS-REFERENCE. See 34 CFR part 74, Subpart L-Programmatic Changes and Budget Revisions.

APPROVAL OF MULTI-YEAR PROJECTS

§ 75.250 Project period can be up to 60 months.

The Secretary may approve a project period of up to 60 months.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27804, July 24, 1987]

§ 75.251 The budget period.

(a) The Secretary usually approves a budget period of not more than 12 months, even if the project has a multi-year project period.

(b) If the Secretary approves a multi-year project period, the Secretary:

(1) Makes a grant to the project for the initial budget period; and

(2) Indicates his or her intention to make continuation awards to fund the remainder of the project period.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.253 Continuation of a multi-year project after the first budget period.

(a) The Secretary may make a continuation award for a budget period after the first budget period of an approved multi-year project if:

(1) The Congress has appropriated sufficient funds under the program;

(2) The recipient has either-

(i) Made substantial progress toward meeting the objectives in its approved application; or

(ii) Obtained the Secretary's approval of changes in the project that-

(A) Do not increase the cost of the grant; and

(B) Enable the recipient to meet those objectives in succeeding budget periods;

(3) The recipient has submitted all reports as required by § 75.118, and

(4) Continuation of the project is in the best interest of the Federal Government.

(b) Subject to the criteria in paragraph (a) of this section, in selecting applications for funding under a program the Secretary gives priority to continuation awards over new grants.

(c) The Secretary considers any funds remaining unobligated by the recipient at the end of a budget period in determining the amount of new funds to be awarded for the next budget period of the grant as follows:

(1) If the unobligated funds are needed to complete activities that were approved for the budget period that is about to end, the Secretary may add the unobligated funds to the amount of funds to be approved for the next budget period of the grant.

(2) If the unobligated funds are not needed to complete activities that were approved for the budget period that is about to end, the Secretary may reduce the amount of new funds awarded for the next budget period by the amount of unobligated funds.

(d) (1) If the Secretary decides, under this section, not to make a continuation award, the Secretary may authorize a no-cost extension of the last budget period of the grant in order to provide for the orderly closeout of the grant.

(2) If the Secretary makes a continuation award under this section-

(i) The Secretary makes the award under §§75.231-75.236; and

(ii) The new budget period begins on the day after the previous budget period ends.

(e) Unless prohibited by program regulations, a recipient that is in the final budget period of a project period may seek continued assistance for the project under the procedures for selecting new projects.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 57 FR 30338, July 8, 1992]

CROSS-REFERENCES: 1. See Subpart C-How to Apply for a Grant.
2. See §75.117 Information needed for a multi-year project; and §75.118 Application for a continuation award.

MISCELLANEOUS

§ 75.260 Allotments and reallotments.

(a) Under some of the programs covered by this part, the Secretary allots funds under a statutory or regulatory formula.

(b) Any reallotment to other grantees will be made by the Secretary in accordance with the authorizing statute for that program.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27804, July 24, 1987]

§ 75.261 Extension of a project period.

(a) The Secretary may extend a project period if-

(1) The extension does not violate any statute or regulations;

(2) The extension does not involve the obligation of additional Federal funds;

(3) The extension is to carry out the activities in the approved application; and

(4)(i) The Secretary determines that, due to special or unusual circumstances applicable to a class of grantees, the project periods for the grantees should be extended; or

(ii)(A) The Secretary determines that special or unusual circumstances would delay completion of the project beyond the end of the project period;

(B) The grantee requests an extension of the project at least 45 calendar days before the end of the project period; and

(C) The grantee provides a written statement before the end of the project period giving the reasons why the extension is appropriate under paragraph (a)(4)(ii)(A) of this section and the period for which the project needs extension.

(b) The Secretary may waive the requirement in paragraph (a)(4)(ii)(B) of this section if-

(1) The grantee could not reasonably have known of the need for the extension on or before the start of the 45-day time period; or

(2) The failure to give notice on or before the start of the 45-day time period was unavoidable.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[57 FR 30338, July 8, 1992]

EFFECTIVE DATE NOTE: At 57 FR 30338, July 8, 1992, §75.261 was revised, effective after the information collection requirements have been approved by the Office of Management and Budget. The Department of Education will publish a document in the *Federal Register* at a later date, announcing the effective date once OMB approval has been obtained. For the convenience of the user, the superseded text appears below.

§ 75.261 Extension Of a Project Period

The Secretary may extend a project period if-

(a) Special or unusual circumstances will delay completion of the project;

(b) The grantee provides the Secretary with a written request for the extension at least 45 days before the end of the project period;

(c) The grantee states the reasons why it needs the extension;

(d) The extension does not violate any statute or regulations;

(e) The extension does not involve the obligation of additional Federal funds; and

(f) The extension is to carry out the activities in the approved application.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.262 Conversion of a grant or a cooperative agreement.

(a)(1) The Secretary may convert a grant to a cooperative agreement or a cooperative agreement to a grant at the time a continuation award is made under §75.253.

(2) In deciding whether to convert a grant to a cooperative agreement or a cooperative agreement to a grant, the Secretary considers the factors included in §75.200(b) (4) and (5).

(b) The Secretary and a recipient may agree at any time to convert a grant to a cooperative agreement or a cooperative agreement to a grant, subject to the factors included in §75.200(b) (4) and (5).

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[57 FR 30339, July 8, 1992]

Subpart E-What Conditions Must Be Met by a Grantee?

NONDISCRIMINATION

§ 75.500 Federal statutes and regulations on nondiscrimination.

Each grantee shall comply with the following statutes and regulations:

Subject	Statute	Regulations
Discrimination on the basis of race, color or national origin.	Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d through 2000d-4).	34 CFR part 100.
Discrimination on the basis of sex.	Title IX of the Education Amendments of 1972 (20 U.S.C. 1681-1683).	34 CFR part 106.
Discrimination on the basis of handicap.	Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).	34 CFR part 104.
Discrimination on the basis of age.	The Age Discrimination Act (42 U.S.C. 6101 *et seq.*).	45 CFR part 90.

Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

PROJECT STAFF

§ 75.511 Waiver of requirement for a full-time project director.

(a) If regulations under a program require a full-time project director, the Secretary may waive that requirement under the following conditions:

(1) The project will not be adversely affected by the waiver.

(2) (i) The project director is needed to coordinate two or more related projects; or

(ii) The project director must teach a minimum number of hours to retain faculty status.

(b) The waiver either permits the grantee:

(1) To use a part-time project director; or

(2) Not to use any project director.

(c) (1) An applicant or a grantee may request the waiver.

(2) The request must be in writing and must demonstrate that a waiver is appropriate under this section.

(3) The Secretary gives the waiver in writing. The waiver is effective on the date the Secretary signs the waiver.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

CROSS-REFERENCE: See 34 CFR 74.103(c) Changes in key people in a research project.

§ 75.515 Use of consultants.

(a) Subject to Federal statutes and regulations, a grantee shall use its general policies and practices when it hires, uses, and pays a consultant as part of the project staff.

(b) The grantee may not use its grant to pay a consultant unless:

(1) There is a need in the project for the services of that consultant; and

(2) The grantee cannot meet that need by using an employee rather than a consultant.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.516 Compensation of consultants-employees of institutions of higher education.

If an institution of higher education receives a grant for research or for educational services, it may pay a consultant's fee to one of its employees only in unusual circumstances and only if:

(a) The work performed by the consultant is in addition to his or her regular departmental load; and

(b) (1) The consultation is across departmental lines; or

(2) The consultation involves a separate or remote operation.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.517 Changes in key staff members.

A grantee shall comply with 34 CFR 74.103(c)(2) concerning replacement or lesser involvement of any key project staff, whether or not the grant is for research.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.519 Dual compensation of staff.

A grantee may not use its grantee to pay a project staff member for time or work for which that staff member is compensated from some other source of funds.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

CONFLICT OF INTEREST

§ 75.524 Conflict of interest: Purpose of §75.525.

(a) The conflict of interest regulations of the Department that apply to a grant are in §75.525.

(b) These conflict of interest regulations do not apply to a ``government'' as defined in 34 CFR part 74.3.

NOTE: A government must provide a conflict of interest assurance under the standard application required by Subpart N of 34 CFR part 74 (Forms for Applying for Grants).

(c) The regulations in §75.525 do not apply to a grantee's procurement contracts. The conflict of interest regulations that cover those procurement contracts are in 34 CFR part 74.

§ 75.525 Conflict of interest: Participation in a project.

(a) A grantee may not permit a person to participate in an administrative decision regarding a project if:

(1) The decision is likely to benefit that person or a member of his or her immediate family; and

(2) The person:

(i) Is a public official; or

(ii) Has a family or business relationship with the grantee.

(b) A grantee may not permit any person participating in the project to use his or her position for a purpose that is-or gives the appearance of being-motivated by a desire for a private financial gain for that person or for others.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

ALLOWABLE COSTS

§ 75.530 General cost principles.

The general principles to be used in determining costs applicable to grants and cost-type contracts under grants are referenced in subpart Q of 34 CFR part 74 (Cost Principles).

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

CROSS-REFERENCE. See 34 CFR part 74, Subpart G-Matching or Cost Sharing.

§ 75.531 Limit on total cost of a project.

A grantee shall insure that the total cost to the Federal Government is not more than the amount stated in the notification of grant award.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.532 Use of funds for religion prohibited.

(a) No grantee may use its grant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

(2) Equipment or supplies to be used for any of those activities.

(3) Construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for any of those activities.

(4) An activity of a school or department of divinity.

(b) As used in this section, *school or department of divinity* means an institution or a component of an institution whose program is specifically for the education of students to:

(1) Prepare them to enter into a religious vocation; or

(2) Prepare them to teach theological subjects.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.533 Acquisition of real property; construction.

No grantee may use its grant for acquisition of real property or for construction unless specifically permitted by the authorizing statute or implementing regulations for the program.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.534 Training grants-automatic increases for additional dependents.

The Secretary may increase a grant to cover the cost of additional dependents not specified in the notice of award under §75.235 if-

(a) Allowances for dependents are authorized by the program statute and are allowable under the grant; and

(b) Appropriations are available to cover the cost.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 57 FR 30339, July 8, 1992]

INDIRECT COST RATES

§ 75.560 General indirect cost rates; exceptions.

(a) The differences between direct and indirect costs and the principles for determining the general indirect cost rate that a grantee may use for grants under most programs are specified in the cost principles for-

(1) Institutions of higher education, at 34 CFR 74.171;

(2) Hospitals, at 34 CFR 74.171;

(3) Other nonprofit organizations, at 34 CFR 74.171;

(4) Commercial (for-profit) organizations, at 34 CFR 74.171; and

(5) State and local governments and federally-recognized Indian tribal organizations, at 34 CFR 80.22.

(b) Sections 75.562-75.568 provide restrictions on indirect cost rates under certain programs.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 57 FR 30339, July 8, 1992]

§ 75.561 Approval of indirect cost rates.

(a) The Secretary approves an indirect cost rate for a grantee other than a local educational agency. For the purposes of this section, the term *local educational agency* does not include a State agency.

(b) Each State educational agency, on the basis of a plan approved by the Secretary, shall approve an indirect cost rate for each local educational agency that requests it to do so.

(c) Each indirect cost rate must be approved annually.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.562 Indirect cost rates for educational training projects.

(a) The Secretary may approve an indirect cost rate for an educational training project at the lesser of:

(1) The actual indirect cost rate of the grantee; or

(2) Eight percent of the total direct costs of the project.

(b) This section does not apply to:

(1) A State (as defined in 34 CFR part 74.3); or

(2) A local government (as defined in 34 CFR part 74.3).

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.563 Restricted indirect cost rate-programs covered.

Sections 75.564-75.568 apply to each program that has a statutory requirement not to use Federal funds to supplant non-Federal funds.

(Authority:20 U.S.C. 1221e-3(a)(1) and 3474)

[57 FR 30339, July 8, 1992]

§ 75.564 Restricted indirect cost rate-formula.

(a) An indirect cost rate for a grant under a program covered by §75.563 is determined by the following formula:

Indirect cost rate=(Administrative charge+ Fixed charges)+(Other expenditures)

(b) Administrative charges, fixed charges, and other expenditures must be determined under §§75.565-75.567.

(c) Under the programs covered by §75.563, a grantee other than a State or a local government (as those terms are defined in 34 CFR part 74.3) may use:

(1) An indirect cost rate computed under paragraph (a) of this section; or

(2) An indirect cost rate of eight percent unless the Secretary determines that the grantee would have a lower rate under paragraph (a) of this section.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.565 Administrative charge.

(a) As used in §75.564, *administrative charge* means the cost of an activity that is for the direction and control of the grantee's affairs that are organization-wide. An activity is not organization-wide if it is limited to one activity, one component of the grantee, one subject, one phase of operations, or other single responsibility.

(b) The term includes the cost of performing a service function, such as accounting, payroll preparation, or personnel management, that is normally at the grantee's level even if the function is physically located elsewhere for convenience or better management.

(c) The term does not include expenditures for:

(1) The governing body of the grantee;

(2) Compensation of the chief administrative officer of the grantee;

(3) Compensation of the chief administrative officer of any component of the grantee; and

(4) Operation of the immediate offices of these officers.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.566 Fixed charges.

As used in §75.564, *fixed charges* means contributions of the grantee to:

(a) Retirement, including State, county, or local retirement funds, Social Security, and pension payments;

(b) Unemployment compensation payments;

(c) Property, employee, health, and liability insurance; and

(d) All similar costs normally considered to be employee fringe benefits.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.567 Other expenditures.

(a) As used in §75.564, *other expenditures* means the grantee's total expenditures for its federally- and non-federally-funded activities in the most recent year for which data are available.

(b) The term does not include:

(1) Administrative charges determined under §75.565;

(2) Fixed charges determined under §75.566;

(3) Capital outlay;

(4) Debt service;

(5) Fines and penalties;

(6) Contingencies; and

(7) Election expenses. However, the term does include election expenses that result from elections required by a program statute.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.568 Using the restricted indirect cost rate.

(a) Under the programs referenced in §75.563, the maximum amount of indirect costs under a grant is determined by the following formula:

Indirect costs=(Indirect cost rate)x(Total direct costs of the grant minus any costs for capital outlay, debt service, or election expenses unless the election is required by a program statute)

(b) If a grantee uses an indirect cost rate, the administrative and fixed charges covered by that rate must be excluded by the grantee from the direct costs it charges to the grant.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.580 Coordination with other activities.

A grantee shall, to the extent possible, coordinate its project with other activities that are in the same geographic area served by the project and that serve similar purposes and target groups.

(Authority: 20 U.S.C. 1221e-3(a)(1); 2890)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 57 FR 30339, July 8, 1992]

EVALUATION

§ 75.590 Evaluation by the recipient.

A recipient shall submit a performance report, or, for the last year of a project, a final report, that evaluates at least annually-

(a) The grantee's progress in achieving the objectives in its approved application;

(b) The effectiveness of the project in meeting the purposes of the program; and

(c) The effect of the project on participants being served by the project.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 57 FR 30339, July 8, 1992]

§ 75.591 Federal evaluation-cooperation by a grantee.

A grantee shall cooperate in any evaluation of the program by the Secretary.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 86297, Dec. 30, 1980]

§ 75.592 Federal evaluation-satisfying requirement for grantee evaluation.

If a grantee cooperates in a Federal evaluation of a program, the Secretary may determine that the grantee meets the evaluation requirements of the program, including §75.590.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

CONSTRUCTION

CROSS-REFERENCE. See 34 CFR part 74, Subpart P-Procurement Standards.

§ 75.600 Use of a grant for construction: purpose of §§75.601-75.615.

Sections 75.601-75.615 apply to:

(a) An applicant that requests funds for construction; and

(b) A grantee whose grant includes funds for construction.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.601 Applicant's assessment of environmental impact.

An applicant shall include with its application its assessment of the impact of the proposed construction on the quality of the environment in accordance with Section 102(2)(C) of the National Environmental Policy Act of 1969 and Executive Order 11514 (34 FR 4247).

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.602 Preservation of historic sites must be described in the application.

(a) An applicant shall describe in its application the relationship of the proposed construction to and probable effect on any district, site, building, structure, or object that is:

(1) Included in the National Register of Historic Places; or

(2) Eligible under criteria established by the Secretary of Interior for inclusion in the National Register of Historic Places.

CROSS-REFERENCE. See 36 CFR part 60 for these criteria.

(b) In deciding whether to make a grant, the Secretary considers:

(1) The information provided by the applicant under paragraph (a) of this section; and

(2) Any comments by the Advisory Council on Historic Preservation.

CROSS-REFERENCE. See 36 CFR part 800, which provides for comments from the Council.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.603 Grantee's title to site.

A grantee must have or obtain a full title or other interest in the site, including right of access, that is sufficient to insure the grantee's undisturbed use and possession of the facilities for 50 years or the useful life of the facilities, whichever is longer.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.604 Availability of cost-sharing funds.

A grantee shall ensure that sufficient funds are available to meet any non-Federal share of the cost of constructing the facility.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.605 Beginning the construction.

(a) A grantee shall begin work on construction within a reasonable time after the grant for the construction is made.

(b) Before construction is advertised or placed on the market for bidding, the grantee shall get approval by the Secretary of the final working drawings and specifications.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.606 Completing the construction.

(a) A grantee shall complete its construction within a reasonable time.

(b) The grantee shall complete the construction in accordance with the application and approved drawings and specifications.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.607 General considerations in designing facilities and carrying out construction.

(a) A grantee shall insure that the construction is:

(1) Functional;

(2) Economical; and

(3) Not elaborate in design or extravagant in the use of materials, compared with facilities of a similar type constructed in the State or other applicable geographic area.

(b) The grantee shall, in developing plans for the facilities, consider excellence of architecture and design and inclusion of works of art. The grantee may not spend more than one percent of the cost of the project on inclusion of works of art.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.608 Areas in the facilities for cultural activities.

A grantee may make reasonable provision, consistent with the other uses to be made of the facilities, for areas in the facilities that are adaptable for artistic and other cultural activities.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[57 FR 30339, July 8, 1992]

§ 75.609 Comply with safety and health standards.

In planning for and designing facilities, a grantee shall observe:

(a) The standards under the Occupational Safety and Health Act of 1970 (Pub. L. 91-576) (See 36 CFR part 1910); and

(b) State and local codes, to the extent that they are more stringent.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.610 Access by the handicapped.

A grantee shall comply with the Federal regulations on access by the handicapped that apply to construction and alteration of facilities. These regulations are:

(a) For residential facilities-24 CFR part 40; and

(b) For non-residential facilities-41 CFR Subpart 101-19.6.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.611 Avoidance of flood hazards.

In planning the construction, a grantee shall, in accordance with the provisions of Executive Order 11988 of February 10, 1978 (43 FR 6030) and rules and regulations that may be issued by the Secretary to carry out those provisions:

(a) Evaluate flood hazards in connection with the construction; and

(b) As far as practicable, avoid uneconomic, hazardous, or unnecessary use of flood plains in connection with the construction.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.612 Supervision and inspection by the grantee.

A grantee shall maintain competent architectural engineering supervision and inspection at the construction site to insure that the work conforms to the approved drawings and specifications.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.613 Relocation assistance by the grantee.

A grantee is subject to the regulations on relocation assistance and real property acquisition in 34 CFR part 15.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.614 Grantee must have operational funds.

A grantee shall insure that, when construction is completed, sufficient funds will be available for effective operation and maintenance of the facilities.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.615 Operation and maintenance by the grantee.

A grantee shall operate and maintain the facilities in accordance with applicable Federal, State, and local requirements.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.616 Energy conservation.

(a) To the extent feasible, a grantee shall design and construct facilities to maximize the efficient use of energy.

(b) The following standards of the American Society of Heating, Refrigerating, and Air Conditioning Engineers (ASHRAE) are incorporated by reference in this section:

(1) ASHRAE-90 A-1980 (Sections 1-9).

(2) ASHRAE-90 B-1975 (Sections 10-11).

(3) ASHRAE-90 C-1977 (Section 12). Incorporation by reference of these provisions has been approved by the Director of the Office of the Federal Register pursuant to the Director's authority under 5 U.S.C. 552 (a) and 1 CFR part 51. The incorporated document is on file at the Department of Education, Grants and Contracts Service, rm. 3636 ROB-3, 400 Maryland Avenue, SW., Washington, DC 20202-4700 or at the Office of the Federal Register, 800 North Capitol St., NW., suite 700, Washington, DC. These standards may be obtained from the publication sales department at the American Society of Heating, Refrigerating, and Air Conditioning Engineers, Inc., 1791 Tullie Circle, NE., Atlanta, Georgia 30329.

(c) A grantee shall comply with ASHRAE standards listed in paragraph (b) of this section in designing and constructing facilities built with project funds.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, 42 U.S.C. 8373 (b); E.O. 12185)

[57 FR 30339, July 8, 1992]

§ 75.617 Compliance with the Coastal Barrier Resources Act

A recipient may not use, within the Coastal Barrier Resources System, funds made available under a program administered by the Secretary for any purpose prohibited by 31 U.S.C. chapter 55 (§§3501-3510).

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, 31 U.S.C. 3504, 3505)

[57 FR 30339, July 8, 1992]

EQUIPMENT AND SUPPLIES

CROSS-REFERENCE. See 34 CFR part 74, Subpart O-Property.

§ 75.618 Charges for use of equipment or supplies.

A grantee may not charge students or school personnel for the ordinary use of equipment or supplies purchased with grant funds.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

PUBLICATIONS AND COPYRIGHTS

§ 75.620 General conditions on publication.

(a) *Content of materials.* Subject to any specific requirements that apply to its grant, a grantee may decide the format and content of project materials that it publishes or arranges to have published.

(b) *Required Statement.* The grantee shall ensure that any publication that contains project materials also contains the following statements:

"The contents of this (insert type of publication; e.g., book, report, film) were developed under a grant from the Department of Education. However, those contents do not necessarily represent the policy of the Department of Education, and you should not assume endorsement by the Federal Government."

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86297, Dec. 30, 1980]

§ 75.621 Copyright policy for grantees.

A grantee may copyright project materials in accordance with 34 CFR parts 74 or 80, as appropriate.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 19118, May 26, 1988; 57 FR 30339, July 8, 1992]

CROSS-REFERENCE. See 34 CFR part 74, subpart F; 34 CFR 74.145 Copyrights; and 34 CFR 80.25 and 80.34.

§ 75.622 Definition of "project materials."

As used in §§75.620-75.621, "project materials" means a copyrightable work developed with funds from a grant of the Department.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[57 FR 30339, July 8, 1992]

INVENTIONS AND PATENTS

CROSS-REFERENCE: See 34 CFR 74.45, Program income-royalties or equivalent income earned from patents or from inventions; 34 CFR 80.25, Program income; and 34 CFR part 6, Inventions and Patents (General).

§ 75.626 Show Federal support; give papers to vest title.

Any patent application filed by a grantee for an invention made under a grant must include the following statement in the first paragraph:

"The invention described in this application was made under a grant from the Department of Education."

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86297, Dec. 30, 1980; 57 FR 30339, July 8, 1992]

OTHER REQUIREMENTS FOR CERTAIN PROJECTS

CROSS-REFERENCE. See 34 CFR part 74, Subpart C-Bonding and Insurance.

§ 75.650 Participation of students enrolled in private schools.

If the authorizing statute for a program requires a grantee to provide for participation by students enrolled in private schools, the grantee shall provide a genuine opportunity for equitable participation in accordance with the requirements that apply to subgrantees under 34 CFR 76.650-76.662.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.681 Protection of human research subjects.

If a grantee uses a human subject in a research project, the grantee shall protect the person from physical, psychological, or social injury resulting from the project.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

CROSS-REFERENCE: See 34 CFR part 97-Protection of Human Subjects

§ 75.682 Treatment of animals.

If a grantee uses an animal in a project, the grantee shall provide the animal with proper care and humane treatment in accordance with the Animal Welfare Act of 1970.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.683 Health or safety standards for facilities.

A grantee shall comply with any Federal health or safety requirements that apply to the facilities that the grantee uses for the project.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

Subpart F-What Are the Administrative Responsibilities of a Grantee?

GENERAL ADMINISTRATIVE RESPONSIBILITIES

§ 75.700 Compliance with statutes, regulations, and applications.

A grantee shall comply with applicable statutes, regulations, and approved applications, and shall use Federal funds in accordance with those statutes, regulations, and applications.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.701 The grantee administers or supervises the project.

A grantee shall directly administer or supervise the administration of the project.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.702 Fiscal control and fund accounting procedures.

A grantee shall use fiscal control and fund accounting procedures that insure proper disbursement of and accounting for Federal funds.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

CROSS-REFERENCE: See 34 CFR part 74, Subpart B-Cash Depositories, Subpart H-Standards for Grantee and Subgrantee Financial Management Systems, and Subpart K-Grant and Subgrant Payment Requirements.

§ 75.703 Obligation of funds during the grant period.

A grantee may use grant funds only for obligations it makes during the grant period.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.707 When obligations are made.

The following table shows when a grantee makes obligations for various kinds of property and services.

If the obligation is for--	The obligation is made--
(a) Acquisition of real or personal property.	On the date the grantee makes a binding written commitment to acquire the property.
(b) Personal services by an employee of the grantee.	When the services are performed.
(c) Personal services by a contractor who is not an employee of the grantee.	On the date on which the grantee makes a binding written commitment to obtain the services.
(d) Performance of work other than personal services.	On the date on which the grantee makes a binding written commitment to obtain the work.
(e) Public utility services.	When the grantee receives the services.
(f) Travel.	When the travel is taken.
(g) Rental of real or personal property.	When the grantee uses the property.
(h) A preagreement cost that was properly approved by the Secretary under the cost principles identified in 34 CFR 74.171 or 80.22.	On the first day of the grant period.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 57 FR 30340, July 8, 1992]

§ 75.708 Prohibition of subgrants.

(a) A grantee may not make a subgrant under a program covered by this part unless specifically authorized by statute.

(b) A grantee may contract for supplies, equipment, construction, and other services, in accordance with 34 CFR part 74, subpart P-Procurement Standards.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27804, July 24, 1987]

REPORTS

CROSS-REFERENCE. See 34 CFR part 74, subpart I-Financial Reporting Requirements, and subpart J-Monitoring and Reporting of Program Performance.

§ 75.720 Financial and performance reports.

(a) This section applies to the reports required under-

(1) 34 CFR 74.73 (Financial Status Report) and 34 CFR part 74, subpart J (Monitoring and Reporting of Program Performance); and

(2) 34 CFR 80.40 (Monitoring and reporting program performance) and 34 CFR 80.41 (Financial reporting).

(b) A grantee shall submit these reports annually, unless the Secretary allows less frequent reporting. However, the Secretary may require a grantee of a grant made under 34 CFR part 700, 706, 707, or 708 (certain programs of the Office of Educational Research and Improvement) to submit performance reports more often than annually.

(c) The Secretary may, under 34 CFR part 74.7 (Special grant or subgrant conditions) or 34 CFR 74.72(e) (regarding grantee accounting systems), or 34 CFR 80.12 (Special grant or subgrant conditions for ''high-risk'' grantees) require a grantee to report more frequently than annually.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[57 FR 30340, July 8, 1992]

EFFECTIVE DATE NOTE: At 57 FR 30340, July 8, 1992, §75.720 was revised, effective after the information collection requirements have been approved by the Office of Management and Budget. The Department of Education will publish a document in the *Federal Register* at a later date, announcing the effective date once OMB approval has been obtained. For the convenience of the user, the superseded text appears below.

§ 75.720 Financial and performance reports

(a) This section applies to the reports required under 34 CFR part 74, subpart I (financial reporting) and subpart J (performance reporting).

(b) A grantee shall submit these reports annually, unless the Secretary allows less frequent reporting. However, the Secretary may require a grantee of the National Institute of Education to submit performance reports more often than annually.

(c) The Secretary may, under 34 CFR part 74.7 (Special grant or subgrant conditions) or 34 CFR 74.72(e) (Grantee accounting systems), require a grantee to report more frequently than annually.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86297, Dec. 30, 1980, as amended at 53 FR 49143, Dec. 6, 1988]

RECORDS

CROSS-REFERENCE. See 34 CFR part 74, subpart D-Retention and Access Requirements for Records.

§ 75.730 Records related to grant funds.

A grantee shall keep records that fully show:

(a) The amount of funds under the grant;

(b) How the grantee uses the funds;

(c) The total cost of the project;

(d) The share of that cost provided from other sources; and

(e) Other records to facilitate an effective audit.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980 and amended at 53 FR 49143, Dec. 6, 1988]

§ 75.731 Records related to compliance.

A grantee shall keep records to show its compliance with program requirements.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.732 Records related to performance.

(a) A grantee shall keep records of significant project experiences and results.

(b) The grantee shall use the records under paragraph (a) to:

(1) Determine progress in accomplishing project objectives; and

(2) Revise those objectives, if necessary.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

CROSS-REFERENCE. See 34 CFR 74.103 (b) and (c)-Procedures for revising objectives.

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980 and amended at 53 FR 49143, Dec. 6, 1988]

§§ 75.733 [Reserved]

§ 75.734 Record retention period.

Unless a longer period is required under 34 CFR part 74, a grantee shall retain records for five years after the completion of the activity for which it uses grant funds.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 34 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980]

CROSS-REFERENCE. See 34 CFR part 74.21-Length of retention period; and 74.22 Starting date of retention period.

PRIVACY

§ 75.740 Protection of and access to student records; student rights in research, experimental programs, and testing.

(a) Most records on present or past students are subject to the requirements of Section 438 of GEPA and its implementing regulations in 34 CFR part 99. (Section 438 is the Family Educational Rights and Privacy Act of 1974.)

(b) Under most programs administered by the Secretary, research, experimentation, and testing are subject to the requirements of section 439 of GEPA and its implementing regulations at 34 CFR part 98.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1232g, 1232h, and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 57 FR 30340, July 8, 1992]

Subpart G-What Procedures Does the Department Use To Get Compliance?

CROSS-REFERENCE. See 34 CFR part 74, Subpart M-Grant and Subgrant Closeout, Suspension, and Termination.

§ 75.900 Waiver of regulations prohibited.

(a) No official, agent, or employee of ED may waive any regulation that applies to a Department program, unless the regulation specifically provides that it may be waived.

(b) No act or failure to act by an official, agent, or employee of ED can affect the authority of the Secretary to enforce regulations.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

§ 75.901 Suspension and termination.

(a) [Reserved]

(b) The Secretary may use the Education Appeal Board to resolve disputes that are not subject to other procedures.

Cross-reference: See the following sections in part 74:

(1) Section 74.113 (Violation of terms).

(2) Section 74.114 (Suspension).

(3) Section 74.115 (Termination).

(4) The last sentence of §74.73(c) (Financial reporting after a termination).

(5) Section 74.112 (Amounts payable to the Federal Government).

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 86297, Dec. 30, 1980]

§ 75.902 [Reserved]

§ 75.903 Effective date of termination.

Termination is effective on the latest of:

(a) The date of delivery to the grantee of the notice of termination;

(b) The termination date given in the notice of termination; or

(c) The date of a final decision of the Secretary under part 78 of this title.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86298, Dec. 30, 1980]

§ 75.910 Cooperation with audits.

A grantee shall cooperate with the Secretary and the Comptroller General of the United States or any of their authorized representatives in the conduct of audits authorized by Federal law. This cooperation includes access without unreasonable restrictions to records and personnel of the grantee for the purpose of obtaining relevant information.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[54 FR 21775, May 19, 1989]

PART 76-STATE-ADMINISTERED PROGRAMS

Subpart A-General

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76.901 Office of Administrative Law Judges.
76.902 Judicial review.
76.910 Cooperation with audits.

Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474, unless otherwise noted.

Source: 45 FR 22517, Apr. 3, 1980, unless otherwise noted. Redesignated at 45 FR 77368, Nov. 21, 1980.

Subpart A-General

REGULATIONS THAT APPLY TO STATE-ADMINISTERED PROGRAMS

§ 76.1 Programs to which part 76 applies.

(a) The regulations in part 76 apply to each State-administered program of the Department.

(b) If a State formula grant program does not have implementing regulations, the Secretary implements the program under the authorizing statute and, to the extent consistent with the authorizing statute, under the General Education Provisions Act and the regulations in this part. For the purposes of this part, the term "State formula grant program" means a program whose authorizing statute or implementing regulations provide a formula for allocating program funds among eligible States.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 84059, Dec. 22, 1980; 47 FR 52354, Nov. 19, 1982; 50 FR 29330, July 18, 1985; 50 FR 32564, Aug. 13, 1985; 50 FR 43545, Oct. 25, 1985; 51 FR 35583, Oct. 6, 1986; 52 FR 27804, July 24, 1987; 54 FR 21776, May 19, 1989; 55 FR 14816, Apr. 18, 1990]

§ 76.2 Exceptions in program regulations to part 76.

If a program has regulations that are not consistent with part 76, the implementing regulations for that program identify the sections of part 76 that do not apply.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 54 FR 21776, May 19, 1989]

ELIGIBILITY FOR A GRANT OR SUBGRANT

§ 76.50 Statutes determine eligibility and whether subgrants are made.

(a) Under a program covered by this part, the Secretary makes a grant:

(1) To the State agency designated by the authorizing statute for the program; or

(2) To the State agency designated by the State in accordance with the authorizing statute.

(b) The authorizing statute determines the extent to which a State may:

(1) Use grant funds directly; and

(2) Make subgrants to eligible applicants.

(c) The regulations in part 76 on subgrants apply to a program only if subgrants are authorized under that program.

(d) The authorizing statute determines the eligibility of an applicant for a subgrant.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27804, July 24, 1987; 54 FR 21776, May 19, 1989]

§ 76.51 A State distributes funds by formula or competition.

If a program statute authorizes a State to make subgrants, the statute:

(a) Requires the State to use a formula to distribute funds;

(b) Gives the State discretion to select subgrantees through a competition among the applicants or through some other procedure;or

(c) Allows some combination of these procedures.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 54 FR 21776, May 19, 1989]

Subpart B-How a State Applies for a Grant

STATE PLANS AND APPLICATIONS

§ 76.100 Effect of this subpart.

This subpart establishes general requirements that a State must meet to apply for a grant under a program covered by this part. Additional requirements are in the authorizing statute and the implementing regulations for the program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[52 FR 27804, July 24, 1987]

§ 76.101 The general State application.

A State that makes subgrants to local educational agencies under a program subject to this part shall have on file with the Secretary a general application that meets the requirements of Section 435 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232d)

[52 FR 27804, July 24, 1987]

§ 76.102 Definition of "State plan" for part 76.

As used in this part, "State-plan" means any of the following documents:

Document	Program	Authorizing statute	Principal Office
State plan	Assistance to States for Education of Handicapped Children	Part B (except section 619), Individuals with Disabilities Education Act (20 U.S.C. 1411 - 1420)	OSERS
Application	Preschool Grants	Section 619, Individuals with Disabilities Education Act (20 U.S.C. 1419)	OSERS
Application	Handicapped Infants and Toddlers	Part H, Individuals with Disabilities Education Act (20 U.S.C. 1471 - 1485)	OSERS
Application or written request for assistance	Client Assistance Program	Section 112, Rehabilitation Act of 1973 (29 U.S.C. 732)	OSERS
Application	Removal of Architectural Barriers to the Handicapped Program	Section 607, Individuals with Disabilities Education Act (20 U.S.C. 1406)	OSERS
State plan	State Vocational Rehabilitation Services Program	Title I, Parts A - C, Rehabilitation Act of 1973 (29 U.S.C. 720 - 741)	OSERS
State plan supplement	State Supported Employment Services Program	Title VI, Part C, Rehabilitation Act of 1973 (29 U.S.C. 795j - 795r)	OSERS
State plan	State Independent Living Services Program	Title VII, Part A, Rehabilitation Act of 1973 (29 U.S.C. 796 - 796d)	OSERS
State plan	State Vocational Education Program	Title I, Part B, Carl D. Perkins Vocational Education Act (20 U.S.C. 2321 - 2325)	OVAE

State plan and application	State-Administered Adult Education Program	Section 341, Adult Education Act (20 U.S.C. 1206)	OVAE
State plan	Even Start Family Literacy Program	Title I, Chapter 1, Part B of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2741 - 2749)	OESE
State application	State Grants for Strengthening Instruction in Mathematics and Science	Title II, Part A, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2981 - 2993)	OESE
State application	Federal, State and Local Partnership for Educational Improvement	Title I, Chapter 2, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C 2911 - 2952 and 2971 - 2976)	OESE
State plan or application	Migrant Education Program	Sections 1201, 1202, Chapter 1, Title I, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2781 and 2782)	OESE
Application	State Student Incentive Grant Program	Section 415C, Higher Education Act of 1965 (20 U.S.C. 1070c - 2)	OPE
Application	Paul Douglas Teacher Scholarship Program	Section 553, Higher Education Act of 1965 (20 U.S.C. 1111b)	OPE
Basic State plan, long-range program, and annual program	The Library Services and Construction Act State-Administered Program	Library Services and Construction Act (20 U.S.C. 351 - 355e - 3)	OERI

Application	Emergency Immigrant Education Program	Emergency Immigrant Education Act (20 U.S.C. 3121 - 3130)	OBEMLA
Application	Transition Program for Refugee Children	Section 412(d) Immigration and Naturalization Act (8 U.S.C. 1522 (d))	OBEMLA
Any document that the authorizing statute for a State-administered program requires a State to submit to receive funds	Any State-administered program without implementing regulations	Section 408(a)(1), General Education Provisions Act and Section 414, Department of Education Organization Act (20 U.S.C. 1221e - 3(a)(1) and 3474)	Dept-wide

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[57 FR 30340, July 8, 1992]

§ 76.103 Three-year State plans.

(a) Beginning no later than fiscal year 1981, each State plan will be effective for a period of three fiscal years, unless the program regulations provide for a longer effective period.

(b) If the Secretary determines that the three-year State plans under a program should be submitted by the States on a staggered schedule, the Secretary may require groups of States to submit or resubmit their plans in different years.

(c) This section does not apply to:

(1) The annual accountability report under Part A of Title I of the Vocational Education Act;

(2) The annual programs under the Library Services and Construction Act;

(3) The application under Sections 141-143 of the Elementary and Secondary Education Act; and

(4) The State application under Section 209 of Title II of the Education for Economic Security Act.

(d) A State may submit an annual State plan under the Vocational Education Act. If a State submits an annual plan under that program, this section does not apply to that plan.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1231g(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980; 50 FR 43545, Oct. 25, 1985]

§ 76.104 A State shall include certain certifications in its State plan.

(a) A State shall include the following certifications in each State plan:

(1) That the plan is submitted by the State agency that is eligible to submit the plan.

(2) That the State agency has authority under State law to perform the functions of the State under the program.

(3) That the State legally may carry out each provision of the plan.

(4) That all provisions of the plan are consistent with State law.

(5) That a State officer, specified by title in the certification, has authority under State law to receive, hold, and disburse Federal funds made available under the plan.

(6) That the State officer who submits the plan, specified by title in the certification, has authority to submit the plan.

(7) That the agency that submits the plan has adopted or otherwise formally approved the plan.

(8) That the plan is the basis for State operation and administration of the program.

(b) [Reserved]

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.106 State documents are public information.

A State shall make the following documents available for public inspection:

(a) All State plans and related official materials.

(b) All approved subgrant applications.
(c) All documents that the Secretary transmits to the State regarding a program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

CONSOLIDATED GRANT APPLICATIONS FOR INSULAR AREAS

Authority: Title V, Pub. L. 95-134, 91 Stat. 1159 (48 U.S.C. 1469a).

§ 76.125 What is the purpose of these regulations?

(a) Sections 76.125 through 76.137 of this part contain requirements for the submission of an application by an Insular Area for the consolidation of two or more grants under the programs described in paragraph (c) of this section.
(b) For the purpose of §§76.125-76.137 of this part the term "Insular Area" means the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, or the Commonwealth of the Northern Mariana Islands.
(c) The Secretary may make an annual consolidated grant to assist an Insular Area in carrying out one or more State-administered formula grant programs of the Department.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[47 FR 17421, Apr. 22, 1982, as amended at 50 FR 29330, July 18, 1985; 50 FR 32564, Aug. 13, 1985; 50 FR 43545, Oct. 25, 1985; 51 FR 35583, Oct. 6, 1986; 54 FR 21776, May 19, 1989; 57 FR 30341, July 8, 1992]

§ 76.126 What regulations apply to the consolidated grant applications for insular areas?

The following regulations apply to those programs included in a consolidated grant:
(a) The regulations in §§76.125 through 76.137; and
(b) The regulations that apply to each specific program included in a consolidated grant for which funds are used.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.127 What is the purpose of a consolidated grant?

An Insular Area may apply for a consolidated grant for two or more of the programs listed in §76.125(c). This procedure is intended to:
(a) Simplify the application and reporting procedures that would otherwise apply for each of the programs included in the consolidated grant; and
(b) Provide the Insular Area with flexibility in allocating the funds under the consolidated grant to achieve any of the purposes to be served by the programs that are consolidated.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.128 What is a consolidated grant?

A consolidated grant is a grant to an Insular Area for any two or more of the programs listed in §76.125(c). The amount of the consolidated grant is the sum of the allocations the Insular Area receives under each of the programs included in the consolidated grant if there had been no consolidation.

Example. Assume the Virgin Islands applies for a consolidated grant that includes programs under the Adult Education Act, Vocational Education Act, and Chapter 1 of the Education Consolidation and Improvement Act. If the Virgin Islands' allocation under the formula for each of these three programs is $150,000, the total consolidated grant to the Virgin Islands would be $450,000.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.129 How does a consolidated grant work?

(a) An Insular Area shall use the funds it receives under a consolidated grant to carry out, in its jurisdiction, one or more of the programs included in the grant.

Example. Assume that Guam applies for a consolidated grant under the Vocational Education Act, the Handicapped Preschool and School Programs-Incentive Grants, and the Adult Education Act and that the sum of the allocations under these programs is $700,000. Guam may choose to allocate this $700,000 among all of the programs authorized under the three programs. Alternatively, it may choose to allocate the entire $700,000 to one or two of the programs; for example, the Adult Education Act Program.

(b) An Insular Area shall comply with the statutory and regulatory requirements that apply to each program under which funds from the consolidated grant are expended.

Example. Assume that American Samoa uses part of the funds under a consolidated grant for the State program under the Adult Education Act. American Samoa need not submit to the Secretary a State plan that requires policies and procedures to assure all students equal access to adult education programs. However, in carrying out the program, American Samoa must meet and be able to demonstrate compliance with this equal access requirement.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.130 How are consolidated grants made?

(a) The Secretary annually makes a single consolidated grant to each Insular Area that meets the requirements of §§76.125 through 76.137 and each program under which the grant funds are to be used and administered.

(b) The Secretary may decide that one or more programs cannot be included in the consolidated grant if the Secretary determines that the Insular Area failed to meet the program objectives stated in its plan for the previous fiscal year in which it carried out the programs.

(c) Under a consolidated grant, an Insular Area may use a single advisory council for any or all of the programs that require an advisory council.

(d) Although Pub. L. 95-134 authorizes the Secretary to consolidate grant funds that the Department awards to an Insular Area, it does not confer eligibility for any grant funds. The eligibility of a particular Insular Area to receive grant funds under a Federal education program is determined under the statute and regulations for that program.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.131 How does an insular area apply for a consolidated grant?

(a) An Insular Area that desires to apply for a grant consolidating two or more programs listed in §76.125(c) shall submit to the Secretary an application that:

(1) Contains the assurances in §76.132; and

(2) Meets the application requirements in paragraph (c) of this section.

(b) The submission of an application that contains these requirements and assurances takes the place of a separate State plan or other similar document required by this part or by the authorizing statutes and regulations for programs included in the consolidated grant.

(c) An Insular Area shall include in its consolidated grant application a program plan that:

(1) Contains a list of the programs in §76.125(c) to be included in the consolidated grant;

(2) Describes the program or programs in §76.125(c) under which the consolidated grant funds will be used and administered;

(3) Describes the goals, objectives, activities, and the means of evaluating program outcomes for the programs for which the Insular Area will use the funds received under the consolidated grant during the fiscal year for which it submits the application, including needs of the population that will be met by the consolidation of funds; and

(4) Contains a budget that includes a description of the allocation of funds-including any anticipated carryover funds of the program in the consolidated grant from the preceding year-among the programs to be included in the consolidated grant.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982, as amended at 53 FR 49143, Dec. 6, 1988]

§ 76.132 What assurances must be in a consolidated grant application?

(a) An Insular Area shall include in its consolidated grant application assurances to the Secretary that it will:

(1) Follow policies and use administrative practices that will insure that non-Federal funds will not be supplanted by Federal funds made available under the authority of the programs in the consolidated grant;

(2) Comply with the requirements (except those relating to the submission of State plans or similar documents) in the authorizing statutes and implementing regulations for the programs under which funds are to be used and administered, (except requirements for matching funds);

(3) Provide for proper and efficient administration of funds in accordance with the authorizing statutes and implementing regulations for those programs under which funds are to be used and administered;

(4) Provide for fiscal control and fund accounting procedures to assure proper disbursement of, and accounting for, Federal funds received under the consolidated grant;

(5) Submit an annual report to the Secretary containing information covering the program(s) for which the grant is used and administered, including financial and program performance information required under 34 CFR part 74, Subparts I and J;

(6) Provide that funds received under the consolidated grant will be under control of, and that title to property acquired with these funds will be in, a public agency, institution, or organization. The public agency shall administer these funds and property;

(7) Keep records, including a copy of the State Plan or application document under which funds are to be spent, which show how the funds received under the consolidated grant have been spent.

(8) Adopt and use methods of monitoring and providing technical assistance to any agencies, organizations, or institutions that carry out the programs under the consolidated grant and enforce any obligations imposed on them under the applicable statutes and regulations.

(9) Evaluate the effectiveness of these programs in meeting the purposes and objectives in the authorizing statutes under which program funds are used and administered;

(10) Conduct evaluations of these programs at intervals and in accordance with procedures the Secretary may prescribe; and

(11) Provide appropriate opportunities for participation by local agencies, representatives of the groups affected by the programs, and other interested institutions, organizations, and individuals in planning and operating the programs.

(b) These assurances remain in effect for the duration of the programs they cover.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.133 What is the reallocation authority?

(a) After an Insular Area receives a consolidated grant, it may reallocate the funds in a manner different from the allocation described in its consolidated grant application. However, the funds cannot be used for purposes that are not authorized under the programs in the consolidated grant under which funds are to be used and administered.

(b) If an Insular Area decides to reallocate the funds it receives under a consolidated grant, it shall notify the Secretary by amending its original application to include an update of the information required under §76.131.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.134 What is the relationship between consolidated and non-consolidated grants?

(a) An Insular Area may request that any number of programs in §76.125(c) be included in its consolidated grant and may apply separately for assistance under any other programs listed in §76.125(c) for which it is eligible.

(b) Those programs that an Insular Area decides to exclude from consolidation-for which it must submit separate plans or applications-are implemented in accordance with the applicable program statutes and regulations. The excluded programs are not subject to the provisions for allocation of funds among programs in a consolidated grant.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.135 Are there any requirements for matching funds?

The Secretary waives all requirements for matching funds for those programs that are consolidated by an Insular Area in a consolidated grant application.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.136 Under what programs may consolidated grant funds be spent?

Insular Areas may only use and administer funds under programs described in §76.125(c) during a fiscal year for which the Insular Area is entitled to receive funds under an appropriation for that program.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982, as amended at 57 FR 30341, July 8, 1992]

§ 76.137 How may carryover funds be used under the consolidated grant application?

Any funds under any applicable program which are available for obligation and expenditure in the year succeeding the fiscal year for which they are appropriated must be obligated and expended in accordance with the consolidated grant application submitted by the Insular Area for that program for the succeeding fiscal year.

(Authority: 20 U.S.C. 1225(b), 48 U.S.C. 1469a)

AMENDMENTS

§ 76.140 Amendments to a State plan.

(a) If the Secretary determines that an amendment to a State plan is essential during the effective period of the plan, the State shall make the amendment.

(b) A State shall also amend a State plan if there is a significant and relevant change in:

(1) The information or the assurances in the plan;

(2) The administration or operation of the plan; or

(3) The organization, policies, or operations of the State agency that received the grant, if the change materially affects the information or assurances in the plan.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1231g(a))

§ 76.141 An amendment requires the same procedures as the document being amended.

If a State amends a State plan under §76.140, the State shall use the same procedures as those it must use to prepare and submit a State plan.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.142 An amendment is approved on the same basis as the document being amended.

The Secretary uses the same procedures to approve an amendment to a State plan-or any other document a State submits-as the Secretary uses to approve the original document.

(Authority: 20 U.S.C. 1221e-3(a)(1))

Subpart C-How a Grant Is Made to a State

APPROVAL OR DISAPPROVAL BY THE SECRETARY

§ 76.201 A State plan must meet all statutory and regulatory requirements.

The Secretary approves a State plan if it meets the requirements of the Federal statutes and regulations that apply to the plan.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.202 Opportunity for a hearing before a State plan is disapproved.

The Secretary may disapprove a State plan only after:

(a) Notifying the State;

(b) Offering the State a reasonable opportunity for a hearing; and

(c) Holding the hearing, if requested by the State.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.235 The notification of grant award.

(a) To make a grant to a State, the Secretary issues and sends to the State a notification of grant award.

(b) The notification of grant award tells the amount of the grant and provides other information about the grant.

(Authority: 20 U.S.C. 1221e-3(a)(1))

ALLOTMENTS AND REALLOTMENTS OF GRANT FUNDS

§ 76.260 Allotments are made under program statute or regulations.

(a) The Secretary allots program funds to a State in accordance with the authorizing statute or implementing regulations for the program.

(b) Any reallotment to other States will be made by the Secretary in accordance with the authorizing statute or implementing regulations for that program.

(Authority: 20 U.S.C. 3474(a))

[50 FR 29330, July 18, 1985]

§ 76.261 Reallotted funds are part of a State's grant.

Funds that a State receives as a result of a reallotment are part of the State's grant for the appropriate fiscal year. However, the Secretary does not consider a reallotment in determining the maximum or minimum amount to which a State is entitled for a following fiscal year.

(Authority: 20 U.S.C. 1221e-3(a)(1))

Subpart D-How To Apply to the State for a Subgrant

§ 76.300 Contact the State for procedures to follow.

An applicant for a subgrant can find out the procedures it must follow by contacting the State agency that administers the program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

CROSS-REFERENCE. See subparts E and G of this part for the general responsibilities of the State regarding applications for subgrants.

§ 76.301 Local educational agency general application.

A local educational agency that applies for a subgrant under a program subject to this part shall have on file with the State a general application that meets the requirements of Section 436 of the General Education Provisions Act.

(Approved by the Office of Management and Budget under control number 1880-0513

(Authority: 20 U.S.C. 1232d)

[52 FR 27804, July 24, 1987; 53 FR 49143, Dec. 6, 1988]

§ 76.302 The notice to the subgrantee.

A State shall notify a subgrantee in writing of:

(a) The amount of the subgrant;

(b) The period during which the subgrantee may obligate the funds; and

(c) The Federal requirements that apply to the subgrant.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49143, Dec. 6, 1988]

§ 76.303 Joint applications and projects.

(a) Two or more eligible parties may submit a joint application for a subgrant.

(b) If the State must use a formula to distribute subgrant funds (see §76.51), the State may not make a subgrant that exceeds the sum of the entitlements of the separate subgrantees.

(c) If the State funds the application, each subgrantee shall:

(1) Carry out the activities that the subgrantee agreed to carry out; and

(2) Use the funds in accordance with Federal requirements.

(d) Each subgrantee shall use an accounting system that permits identification of the costs paid for under its subgrant.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.304 Subgrantee shall make subgrant application available to the public.

A subgrantee shall make any application, evaluation, periodic program plan, or report relating to each program available for public inspection.

(Authority: 20 U.S.C. 1221e-3(a)(1); 1232e)

Subpart E-How a Subgrant Is Made to an Applicant

§ 76.400 State procedures for reviewing an application.

A State that receives an application for a subgrant shall take the following steps:

(a) *Review.* The State shall review the application.

(b) *Approval-entitlement programs.* The State shall approve an application if:

(1) The application is submitted by an applicant that is entitled to receive a subgrant under the program; and

(2) The applicant meets the requirements of the Federal statutes and regulations that apply to the program.

(c) *Approval-discretionary programs.* The State may approve an application if:

(1) The application is submitted by an eligible applicant under a program in which the State has the discretion to select subgrantees;

(2) The applicant meets the requirements of the Federal statutes and regulations that apply to the program; and

(3) The State determines that the project should be funded under the authorizing statute and implementing regulations for the program.

(d) *Disapproval-entitlement and discretionary programs.* If an application does not meet the requirements of the Federal statutes and regulations that apply to a program, the State shall not approve the application.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.401 Disapproval of an application-opportunity for a hearing.

(a) *State agency hearing before disapproval.* Under the programs listed in the chart below, the State agency that administers the program shall provide an applicant with notice and an opportunity for a hearing before it may disapprove the application.

Program	Authorizing statute	Implementing regulations Title 34 CFR Part
Chapter 1, Program in Local Educational Agencies	Title I, Chapter 1, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2701 - 2731, 2821 - 2838, 2851 - 2854, and 2891 - 2901)	200
Chapter 1, Program for Neglected and Delinquent Children	Title I, Chapter 1, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2801 - 2804)	203
State Grants for Strengthening Instruction in Mathematics and Science	Title II, Part A, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2981 - 2993)	208
Federal, State, and Local Partnership for Educational Improvement	Title I, Chapter 2, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2911 - 2952 and 2971 - 2976)	298

Assistance to States for Education of Handicapped Children	Part B, Individuals with Disabilities Education Act (except Section 619) (20 U.S.C. 1411 - 1420)	300
Preschool Grants	Section 619, Individuals with Disabilities Education Act (20 U.S.C. 1419)	301
Chapter 1, State-Operated or Supported Programs for Handicapped Children	Title 1, Chapter 1, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2791 - 2795)	302
Transition Program for Refugee Children	Section 412(d), Immigration and Naturalization Act (8 U.S.C. 1522(d))	538
Emergency Immigrant Education Program	Emergency Immigrant Education Act (20 U.S.C. 3121 - 3130)	581
Financial Assistance for Construction, Reconstruction, or Renovation of Higher Education Facilities	Section 711, Higher Education Act of 1965 (20 U.S.C. 1132b)	617

(b) *Other programs-hearings not required.* Under other programs covered by this part, a State agency-other than a State educational agency-is not required to provide an opportunity for a hearing regarding the agency's disapproval of an application.

(c) If an applicant for a subgrant alleges that any of the following actions of a State educational agency violates a State or Federal statute or regulation, the State educational agency and the applicant shall use the procedures in paragraph (d) of this section:

(1) Disapproval of or failure to approve the application or project in whole or in part.

(2) Failure to provide funds in amounts in accordance with the requirements of statutes and regulations.

(d) *State educational agency hearing procedures.* (1) If the applicant applied under a program listed in paragraph (a) of this section, the State educational agency shall provide an opportunity for a hearing before the agency disapproves the application.

(2) If the applicant applied under a program not listed in paragraph (a) of this section, the State educational agency shall provide an opportunity for a hearing either before or after the agency disapproves the application.

(3) The applicant shall request the hearing within 30 days of the action of the State educational agency.

(4)(i) Within 30 days after it receives a request, the State educational agency shall hold a hearing on the record and shall review its action.

(ii) No later than 10 days after the hearing the agency shall issue its written ruling, including findings of fact and reasons for the ruling.

(iii) If the agency determines that its action was contrary to State or Federal statutes or regulations that govern the applicable program, the agency shall rescind its action.

(5) If the State educational agency does not rescind its final action after a review under this paragraph, the applicant may appeal to the Secretary. The applicant shall file a notice of the appeal with the Secretary within 20 days after the applicant has been notified by the State educational agency of the results of the agency's review. If supported by substantial evidence, findings of fact of the State educational agency are final.

(6)(i) The Secretary may also issue interim orders to State educational agencies as he or she may decide are necessary and appropriate pending appeal or review.

(ii) If the Secretary determines that the action of the State educational agency was contrary to Federal statutes or regulations that govern the applicable program, the Secretary issues an order that requires the State educational agency to take appropriate action.

(7) Each State educational agency shall make available at reasonable times and places to each applicant all records of the agency pertaining to any review or appeal the applicant is conducting under this section, including records of other applicants.

(8) If a State educational agency does not comply with any provision of this section, or with any order of the Secretary under this section, the Secretary immediately terminates all assistance to the State educational agency under the applicable program.

(e) *Other State agency hearing procedures.* State agencies that are required to provide a hearing under paragraph (a) of this section-other than State educational agencies-are not required to use the procedures in paragraph (d) of this section.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1231b-2, 2831(a), 2974(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980, 50 FR 43545, Oct. 25, 1985; 52 FR 27805, July 24, 1987; 54 FR 21775 and 21776, May 19, 1989; 55 FR 14816, Apr. 18, 1990; 57 FR 30341, July 8, 1992]

Subpart F-What Conditions Must Be Met by the State and Its Subgrantees?

NONDISCRIMINATION

§ 76.500 Federal statutes and regulations on nondiscrimination.

A State and a subgrantee shall comply with the following statutes and regulations:

Subject	Statute	Regulations
Discrimination on the basis of race, color or national origin.	Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d through 2000d--4).	34 CFR part 100.
Discrimination on the basis of sex.	Title IX of the Education Amendments of 1972 (20 U.S.C. 1681-1683).	34 CFR part 106.
Discrimination on the basis of handicap.	Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).	34 CFR part 104.

Discrimination on the basis of age.	The Age Discrimination Act (42 U.S.C. 6101 *et seq.*).	45 CFR part 90.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

ALLOWABLE COSTS

§ 76.530 General cost principles.

Subpart Q of 34 CFR part 74 references the general cost principles that apply to grants, subgrants, and cost-type contracts under grants and subgrants.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.532 Use of funds for religion prohibited.

(a) No State or subgrantee may use its grant or subgrant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

(2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.

(3) Construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for any of the activities specified in paragraph (a)(1) of this section.

(4) An activity of a school or department of divinity.

(b) As used in this section, *school or department of divinity* means an institution or a component of an institution whose program is specifically for the education of students to:

(1) Prepare them to enter into a religious vocation; or

(2) Prepare them to teach theological subjects.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

§ 76.533 Acquisition of real property; construction.

No State or subgrantee may use its grant or subgrant for acquisition of real property or for construction unless specifically permitted by the authorizing statute or implementing regulations for the program.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

§ 76.534 Use of tuition and fees restricted.

No State or subgrantee may count tuition and fees collected from students toward meeting matching, cost sharing, or maintenance of effort requirements of a program.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

INDIRECT COST RATES

§ 76.560 General indirect cost rates; exceptions

(a) The differences between direct and indirect costs and the principles for determining the general indirect cost rate that a grantee may use for grants under most programs are specified in the cost principles for-

(1) Institutions of higher education, at 34 CFR 74.171;

(2) Hospitals, at 34 CFR 74.171;

(3) Other nonprofit organizations, at 34 CFR 74.171;

(4) Commercial (for-profit) organizations, at 34 CFR 74.171; and

(5) State and local governments and Federally-recognized Indian tribal organizations, at 34 CFR 80.22.

(b) Section 76.563 provides restrictions on indirect cost rates under certain programs.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2381(a), and 3474)

[57 FR 30341, July 8, 1992]

§ 76.561 Approval of indirect cost rates.

(a) The Secretary approves an indirect cost rate for a State agency and for a subgrantee other than a local educational agency. For the purposes of this section, the term "local educational agency" does not include a State agency.

(b) Each State educational agency, on the basis of a plan approved by the Secretary, shall approve an indirect cost rate for each local educational agency that requests it to do so.

(c) Each indirect cost rate must be approved annually.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.563 Restricted indirect cost rate-programs covered.

If a State or a subgrantee decides to charge indirect costs to a program that has a statutory requirement prohibiting the use of Federal funds to supplant non-Federal funds, the State or subgrantee shall use a restricted indirect cost rate computed under 34 CFR 75.564-75.568.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

[55 FR 14816, Apr. 18, 1990]

§ 76.580 Coordination with other activities.

A State and a subgrantee shall, to the extent possible, coordinate each of its projects with other activities that are in the same geographic area served by the project and that serve similar purposes and target groups.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2890)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 57 FR 30341, July 8, 1992]

EVALUATION

§ 76.591 Federal evaluation-cooperation by a grantee.

A grantee shall cooperate in any evaluation of the program by the Secretary.

(Authority: 20 U.S.C. 1226c, 1231a, 2831(a), 3474)

[45 FR 86298, Dec. 30, 1980, as amended at 57 FR 30341, July 8, 1992]

§ 76.592 Federal evaluation-satisfying requirement for State or subgrantee evaluation.

If a State or a subgrantee cooperates in a Federal evaluation of a program, the Secretary may determine that the State or subgrantee meets the evaluation requirements of the program.

(Authority: 20 U.S.C. 1226c; 1231a)

CONSTRUCTION

§ 76.600 Where to find construction regulations.

(a) A State or a subgrantee that requests program funds for construction, or whose grant or subgrant includes funds for construction, shall comply with the rules on construction that apply to applicants and grantees under 34 CFR 75.600-75.617.

(b) The State shall perform the functions that the Secretary performs under §§75.602 (Preservation of historic sites) and 75.605 (Approval of drawings and specifications) of this title.

(c) The State shall provide to the Secretary the information required under 34 CFR 75.602(a) (Preservation of historic sites).

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86298, Dec. 30, 1980; 57 FR 30341, July 8, 1992]

PARTICIPATION OF STUDENTS ENROLLED IN PRIVATE SCHOOLS

§ 76.650 Private schools; purpose of §§76.651-76.662.

(a) some programs, the authorizing statute requires that a State and its subgrantees provide for participation by students enrolled in private schools. Sections 76.651-76.662 apply to those programs and provide rules for that participation. These sections do not affect the authority of the State or a subgrantee to enter into a contract with a private party.

(b) If any other rules for participation of students enrolled in private schools apply under a particular program, they are in the authorizing statute or implementing regulations for that program.

(Authority: 20 U.S.C. 1221e-3(a)(1)).

NOTE: Some program statutes authorize the Secretary-under certain circumstances-to provide benefits directly to private school students. These "bypass" provisions-where they apply-are implemented in the individual program regulations.

§ 76.651 Responsibility of a State and a subgrantee.

(a)(1) A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in §§76.652-76.662 and in the authorizing statute and implementing regulations for a program.

(2) The subgrantee shall provide that opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs.

(3) The subgrantee shall maintain continuing administrative direction and control over funds and property that benefit students enrolled in private schools.

(b)(1) A State shall ensure that each subgrantee complies with the requirements in §§76.651-76.662.

(2) If a State carries out a project directly, it shall comply with these requirements as if it were a subgrantee.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.652 Consultation with representatives of private school students.

(a) An applicant for a subgrant shall consult with appropriate representatives of students enrolled in private schools during all phases of the development and design of the project covered by the application, including consideration of:

(1) Which children will receive benefits under the project;

(2) How the children's needs will be identified;

(3) What benefits will be provided;

(4) How the benefits will be provided; and

(5) How the project will be evaluated.

(b) A subgrantee shall consult with appropriate representatives of students enrolled in private schools before the subgrantee makes any decision that affects the opportunities of those students to participate in the project.

(c) The applicant or subgrantee shall give the appropriate representatives a genuine opportunity to express their views regarding each matter subject to the consultation requirements in this section.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.653 Needs, number of students, and types of services.

A subgrantee shall determine the following matters on a basis comparable to that used by the subgrantee in providing for participation of public school students:

(a) The needs of students enrolled in private schools.

(b) The number of those students who will participate in a project.

(c) The benefits that the subgrantee will provide under the program to those students.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.654 Benefits for private school students.

(a) *Comparable benefits.* The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools.

(b) *Same Benefits.* If a subgrantee uses funds under a program for public school students in a particular attendance area, or grade or age level, the subgrantee shall insure equitable opportunities for participation by students enrolled in private schools who:

(1) Have the same needs as the public school students to be served; and

(2) Are in that group, attendance area, or age or grade level.

(c) *Different benefits.* If the needs of students enrolled in private schools are different from the needs of students enrolled in public schools, a subgrantee shall provide program benefits for the private school students that are different from the benefits the subgrantee provides for the public school students.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.655 Level of expenditures for students enrolled in private schools.

(a) Subject to paragraph (b) of this section, a subgrantee shall spend the same average amount of program funds on:

(1) A student enrolled in a private school who receives benefits under the program; and

(2) A student enrolled in a public school who receives benefits under the program.

(b) The subgrantee shall spend a different average amount on program benefits for students enrolled in private schools if the average cost of meeting the needs of those students is different from the average cost of meeting the needs of students enrolled in public schools.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.656 Information in an application for a subgrant.

An applicant for a subgrant shall include the following information in its application:

(a) A description of how the applicant will meet the Federal requirements for participation of students enrolled in private schools.

(b) The number of students enrolled in private schools who have been identified as eligible to benefits under the program.

(c) The number of students enrolled in private schools who will receive benefits under the program.

(d) The basis the applicant used to select the students.

(e) The manner and extent to which the applicant complied with §76.652 (consultation).

(f) The places and times that the students will receive benefits under the program.

(g) The differences, if any, between the program benefits the applicant will provide to public and private school students, and the reasons for the differences.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.657 Separate classes prohibited.

A subgrantee may not use program funds for classes that are organized separately on the basis of school enrollment or religion of the students if:

(a) The classes are at the same site; and

(b) The classes include students enrolled in public schools and students enrolled in private schools.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.658 Funds not to benefit a private school.

(a) A subgrantee may not use program funds to finance the existing level of instruction in a private school or to otherwise benefit the private school.

(b) The subgrantee shall use program funds to meet the specific needs of students enrolled in private schools, rather than:

(1) The needs of a private school; or

(2) The general needs of the students enrolled in a private school.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.659 Use of public school personnel.

A subgrantee may use program funds to make public personnel available in other than public facilities:

(a) To the extent necessary to provide equitable program benefits designed for students enrolled in a private school; and

(b) If those benefits are not normally provided by the private school.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.660 Use of private school personnel.

A subgrantee may use program funds to pay for the services of an employee of a private school if:

(a) The employee performs the services outside of his or her regular hours of duty; and

(b) The employee performs the services under public supervision and control.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.661 Equipment and supplies.

(a) Under some program statutes, a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the subgrantee acquires with program funds. This public agency is usually the subgrantee.

(b) The subgrantee may place equipment and supplies in a private school for the period of time needed for the project.

(c) The subgrantee shall insure that the equipment or supplies placed in a private school:

(1) Are used only for the purposes of the project; and

(2) Can be removed from the private school without remodeling the private school facilities.

(d) The subgrantee shall remove equipment or supplies from a private school if:

(1) The equipment or supplies are no longer needed for the purposes of the project; or

(2) Removal is necessary to avoid use of the equipment of supplies for other than project purposes.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.662 Construction.

A subgrantee shall insure that program funds are not used for the construction of private school facilities.

(Authority: 20 U.S.C. 1221e-3(a)(1))

OTHER REQUIREMENTS FOR CERTAIN PROGRAMS

CROSS-REFERENCE: See 34 CFR part 74, Subpart C-Bonding and Insurance; and 34 CFR 74.144-Inventions and patents.

PROCEDURES FOR BYPASS

§ 76.670 Applicability and filing requirements.

(a) The regulations in §§76.671 through 76.677 apply to the following programs under which the Secretary is authorized to waive the requirements for providing services to private school children and to implement a bypass:

CFDA number and name of program	Authorizing statute	Implementing regulations Title 34 CFR part
84.010 Chapter 1 Program in Local Educational Agencies	Chapter 1, Title I, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2701 *et seq.*)	200
84.151 Federal, State, and Local Partnership for Educational Improvement.	Chapter 2, Title I, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2911-2952, 2971-2976).	298
84.164 Mathematics and Science Education.	Title II, Part A, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2981-2993).	208
84.186 State and Local Programs.	Part B, Drug Free Schools and Communities Act of 1986 (20 U.S.C. 3191-3197).	None

(b) *Filing requirements.*

(1) Any written submission under §§76.671 through 76.675 must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(2) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(3) The filing date for a written submission is the date the document is-

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission.

(4) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(5) If a document is filed by facsimile transmission, the Secretary or the hearing officer, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(Authority: 20 U.S.C. 2727(b), 2972(d)-(e), 2990(c), 3223(c))

54 FR 21775, May 19, 1989, as amended at 57 FR 56795, Nov. 30, 1992]

§ 76.671 Notice by the Secretary.

(a) Before taking any final action to implement a bypass under a program listed in §76.670, the Secretary provides the affected grantee and subgrantee, if appropriate, with written notice.

(b) In the written notice, the Secretary-

(1) States the reasons for the proposed bypass in sufficient detail to allow the grantee and subgrantee to respond;

(2) Cites the requirement that is the basis for the alleged failure to comply; and

(3) Advises the grantee and subgrantee that they-

(i) Have at least 45 days after receiving the written notice to submit written objections to the proposed bypass; and

(ii) May request in writing the opportunity for a hearing to show cause why the bypass should not be implemented.

(c) The Secretary sends the notice to the grantee and subgrantee by certified mail with return receipt requested.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21775, May 19, 1989]

§ 76.672 Bypass procedures.

Sections 76.673 through 76.675 contain the procedures that the Secretary uses in conducting a show cause hearing. The hearing officer may modify the procedures for a particular case if all parties agree the modification is appropriate.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.673 Appointment and functions of a hearing officer.

(a) If a grantee or subgrantee requests a hearing to show cause why the Secretary should not implement a bypass, the Secretary appoints a hearing officer and notifies appropriate representatives of the affected private school children that they may participate in the hearing.

(b) The hearing officer has no authority to require or conduct discovery or to rule on the validity of any statute or regulation.

(c) The hearing officer notifies the grantee, subgrantee, and representatives of the private school children of the time and place of the hearing.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.674 Hearing procedures.

(a) The following procedures apply to a show cause hearing regarding implementation of a bypass:

(1) The hearing officer arranges for a transcript to be taken.

(2) The grantee, subgrantee, and representatives of the private school children each may-

(i) Be represented by legal counsel; and

(ii) Submit oral or written evidence and arguments at the hearing.

(b) Within 10 days after the hearing, the hearing officer-

(1) Indicates that a decision will be issued on the basis of the existing record; or

(2) Requests further information from the grantee, subgrantee, representatives of the private school children, or Department officials.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.675 Posthearing procedures.

(a) (1) Within 120 days after the record of a show cause hearing is closed, the hearing officer issues a written decision on whether a bypass should be implemented.

(2) The hearing officer sends copies of the decision to the grantee, subgrantee, representatives of the private school children, and the Secretary.

(b) Within 30 days after receiving the hearing officer's decision, the grantee, subgrantee, and representatives of the private school children may each submit to the Secretary written comments on the decision.

(c) The Secretary may adopt, reverse, modify, or remand the hearing officer's decision.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.676 Judicial review of a bypass action.

If a grantee or subgrantee is dissatisfied with the Secretary's final action after a proceeding under §§76.672 through 76.675, it may, within 60 days after receiving notice of that action, file a petition for review with the United States Court of Appeals for the circuit in which the State is located.

(Authority: 20 U.S.C. 2727(b)(4)(B)-(D), 2972(h)(2)-(4), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.677 Continuation of a bypass.

The Secretary continues a bypass until the Secretary determines that the grantee or subgrantee will meet the requirements for providing services to private school children.

(Authority: 20 U.S.C. 2727(b)(3)(D), 2972(f), 1221e-3(a)(1))

[54 FR 21776, May 19, 1989]

§ 76.681 Protection of human subjects.

If a State or a subgrantee uses a human subject in a research project, the State or subgrantee shall protect the person from physical, psychological, or social injury resulting from the project.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

CROSS-REFERENCE. See 34 CFR part 97-Protection of human subjects.

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 57 FR 30341, July 8, 1992]

§ 76.682 Treatment of animals.

If a State or a subgrantee uses an animal in a project, the State or subgrantee shall provide the animal with proper care and humane treatment in accordance with the Animal Welfare Act of 1970.

(Authority: Pub. L. 89-544, as amended)

§ 76.683 Health or safety standards for facilities.

A State and a subgrantee shall comply with any Federal health or safety requirements that apply to the facilities that the State or subgrantee uses for a project.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

Subpart G-What Are the Administrative Responsibilities of the State and Its Subgrantees?

GENERAL ADMINISTRATIVE RESPONSIBILITIES

§ 76.700 Compliance with statutes, regulations, State plan, and applications.

A State and a subgrantee shall comply with the State plan and applicable statutes, regulations, and approved applications, and shall use Federal funds in accordance with those statutes, regulations, plan, and applications.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.701 The State or subgrantee administers or supervises each project.

A State or a subgrantee shall directly administer or supervise the administration of each project.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.702 Fiscal control and fund accounting procedures.

A State and a subgrantee shall use fiscal control and fund accounting procedures that insure proper disbursement of and accounting for Federal funds.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.703 When a State may begin to obligate funds.

(a) A State may not begin to obligate funds under a program until the later of the following two dates:

(1) The date that the State plan is mailed or hand delivered to the Secretary in substantially approvable form.

(2) The date that the funds are first available for obligation by the Secretary.

(b) (1) The State must show one of the following as proof of mailing:

(i) A legibly dated U.S. Postal Service postmark.

(ii) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(iii) A dated shipping label, invoice, or receipt from a commercial carrier.

(iv) Any other proof of mailing acceptable to the Secretary.

(2) If a State plan is mailed through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

(i) A private metered postmark.

(ii) A mail receipt that is not dated by the U.S. Postal Service.

NOTE: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, a State should check with its local post office.

(c) After determining that a State plan is in substantially approvable form, the Secretary informs the State of the date on which it could begin to obligate funds. Reimbursement for those obligations is subject to final approval of the State plan.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

§ 76.704 When certain subgrantees may begin to obligate funds.

(a) If the authorizing statute for a program requires a State to make subgrants on the basis of a formula (see §76.5), the State may not authorize an applicant for a subgrant to obligate funds until the later of the following two dates:

(1) The date that the State may begin to obligate funds under §76.703; or

(2) The date that the applicant submits its application to the State in substantially approvable form.

(b) Reimbursement for obligations under paragraph (a) of this section is subject to final approval of the application.

(c) If the authorizing statute for a program gives the State discretion to select subgrantees, the State may not authorize an applicant for a subgrant to obligate funds until the subgrant is made. However, the State may approve pre-agreement costs in accordance with the cost principles that are appended to 34 CFR part 74 (Appendices C-F).

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

§ 76.705 Funds may be obligated during a "carryover period."

(a) If a State or a subgrantee does not obligate all of its grant or subgrant funds by the end of the fiscal year for which Congress appropriated the funds, it may obligate the remaining funds during a carryover period of one additional fiscal year.

(b) The State shall return to the Federal Government any carryover funds not obligated by the end of the carryover period by the State and its subgrantees.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: U.S.C. 1225(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980]

§ 76.706 Obligations made during a carryover period are subject to current statutes, regulations, and applications.

A State and a subgrantee shall use carryover funds in accordance with:

(a) The Federal statutes and regulations that apply to the program and are in effect for the carryover period; and

(b) Any State plan, or application for a subgrant, that the State or subgrantee is required to submit for the carryover period.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1225(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980]

§ 76.707 When obligations are made.

The following table shows when a State or a subgrantee makes obligations for various kinds of property and services.

If the obligation is for--	The obligation is made--
(a) Acquisition of real or personal property.	On the date the State or subgrantee makes a binding written commitment to acquire the property.
(b) Personal services by an employee of the State or subgrantee.	When the services are performed.
(c) Personal services by a contractor who is not an employee of the State or subgrantee.	On the date on which the State or subgrantee makes a binding written commitment to obtain the services.
(d) Performance of work other than personal services.	On the date on which the State or subgrantee makes a binding written commitment to obtain the work.
(e) Public utility services.	When the State or subgrantee receives the services.
(f) Travel.	When the travel is taken.
(g) Rental of real or personal property.	When the State or subgrantee uses the property.
(h) A preagreement cost that was properly approved by the Secretary under the cost principles identified in 34 CFR 74.171 or 80.22	On the first day of the subgrant period.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 55 FR 14817, Apr. 18, 1990; 57 FR 30342, July 8, 1992]

REPORTS

§ 76.720 Financial and performance reports by a State.

(a) This section applies to a State's reports required under 34 CFR 80.41 (Financial reporting) and 34 CFR 80.40 (Monitoring and reporting of program performance).

(b) A State shall submit these reports annually, unless the Secretary allows less frequent reporting.

(c) However, the Secretary may, under 34 CFR 80.12 (Special grant or subgrant conditions for "high-risk" grantees) or 34 CFR 80.20 (Standards for financial management systems) require a State to report more frequently than annually.

(Authority: 20 U.S.C. 122e-3(a)(1), 2831(a), and 3474)

[57 FR 30342, July 8, 1992]

EFFECTIVE DATE NOTE: At 57 FR 30341, July 8, 1992, §76.720 was revised, effective after the information collection requirements have been approved by the Office of Management and Budget. The Department of Education will publish a document in the *Federal Register* at a later date, announcing the effective date once OMB approval has been obtained. For the convenience of the user, the superseded text appears below.

§ 76.720 Financial and performance reports by state

(a) This section applies to a State's reports required under 34 CFR part 74, subparts I (financial reporting) and J (performance reporting).

(b) A State shall submit these reports annually, unless the Secretary allows less frequent reporting.

(c) However, the Secretary may, under 34 CFR part 74.7 (Special grant or subgrant conditions) or 34 CFR 74.72(e) (Grantee accounting systems), require a State to report more frequently than annually.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49143, Dec. 9, 1988]

§ 76.722 A subgrantee makes reports required by the State.

A State may require a subgrantee to furnish reports that the State needs to carry out its responsibilities under the program.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

RECORDS

§ 76.730 Records related to grant funds.

A State and a subgrantee shall keep records that fully show:

(a) The amount of funds under the grant or subgrant;

(b) How the State or subgrantee uses the funds;

(c) The total cost of the project;

(d) The share of that cost provided from other sources; and

(e) Other records to facilitate an effective audit.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1232f)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49143, Dec. 6, 1988]

§ 76.731 Records related to compliance.

A State and a subgrantee shall keep records to show its compliance with program requirements.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.734 Record retention period.

A State and a subgrantee shall retain records for five years after completion of the activity for which they use grant or subgrant funds.

Note: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1232f(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980; 55 FR 14816, Apr. 18, 1990]

PRIVACY

§ 76.740 Protection of and access to student records; student rights in research, experimental programs, and testing.

(a) Most records on present or past students are subject to the requirements of Section 438 of GEPA and its implementing regulations under 34 CFR part 99. (Section 438 is the Family Educational Rights and Privacy Act of 1974.)

(b) Under most programs administered by the Secretary, research, experimentation, and testing are subject to the requirements of section 439 of GEPA and its implementing regulations at 34 CFR part 98.

(Authority: 20 U.S.C. 122e-3(a)(1), 1232g, 1232h, 2831(a), 2974(b), and 3474)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 57 FR 30342, July 8, 1992]

USE OF FUNDS BY STATES AND SUBGRANTEES

§ 76.760 More than one program may assist a single activity.

A State or a subgrantee may use funds under more than one program to support different parts of the same project if the State or subgrantee meets the following conditions:

(a) The State or subgrantee complies with the requirements of each program with respect to the part of the project assisted with funds under that program.

(b) The State or subgrantee has an accounting system that permits identification of the costs paid for under each program.

(Authority: 20 U.S.C. 1221e-3(a)(1)d, 2831(a), 2974(b))

§ 76.761 Federal funds may pay 100 percent of cost.

A State or a subgrantee may use program funds to pay up to 100 percent of the cost of a project if:

(a) The State or subgrantee is not required to match the funds; and

(b) The project can be assisted under the authorizing statute and implementing regulations for the program.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

STATE ADMINISTRATIVE RESPONSIBILITIES

§ 76.770 A State shall have procedures to ensure compliance.

Each State shall have procedures for reviewing and approving applications for subgrants and amendments to those applications, for providing technical assistance, for evaluating projects, and for performing other administrative responsibilities the State has determined are necessary to ensure compliance with applicable statutes and regulations.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

[57 FR 30342, July 8, 1992]

§ 76.783 State educational agency action-subgrantee's opportunity for a hearing.

(a) A subgrantee may request a hearing if it alleges that any of the following actions by the State educational agency violated a State or Federal statute or regulation:

(1) Ordering, in accordance with a final State audit resolution determination, the repayment of misspent or misapplied Federal funds; or

(2) Terminating further assistance for an approved project.

(b) The procedures in §76.401(d)(2)-(7) apply to any request for a hearing under this section.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1231b-2)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980; 57 FR 30342, July 8, 1992]

Subpart H-What Procedures Does the Secretary Use to Get Compliance?

§ 76.900 Waiver of regulations prohibited.

(a) No official, agent, or employee of ED may waive any regulation that applies to a Department program unless the regulation specifically provide that it may be waived.

(b) No act or failure to act by an official, agent, or employee of ED can affect the authority of the Secretary to enforce regulations.

(Authority: 43 Dec. Comp. Gen. 31(1963))

§ 76.901 Office of Administrative Law Judges.

(a) The Office of Administrative Law Judges, established under Part E of GEPA, has the following functions:

(1) Recovery of funds hearings under section 452 of GEPA.

(2) Withholding hearings under section 455 of GEPA.

(3) Cease and desist hearings under section 456 of GEPA.

(4) Any other proceeding designated by the Secretary under section 451 of GEPA.

(b) The regulations of the Office of Administrative Law Judges are at 34 CFR part 81.

(Authority: 20 U.S.C. 1234)

[57 FR 30342, July 8, 1992]

§ 76.902 Judicial review.

After a hearing by the Secretary, a State is usually entitled-generally by the statute that required the hearing-to judicial review of the Secretary's decision.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.910 Cooperation with audits.

A grantee or subgrantee shall cooperate with the Secretary and the Comptroller General of the United States or any of their authorized representatives in the conduct of audits authorized by Federal law. This cooperation includes access without unreasonable restrictions to records and personnel of the grantee or subgrantee for the purpose of obtaining relevant information.

(Authority: 5 U.S.C. Appendix 3, Sections 4(a)(1), 4(b)(1)(A), and 6(a)(1); 20 U.S.C. 1221e-3(a)(1), 1232f)

[54 FR 21776, May 19, 1989]

(**NOTE:** The following version of Part 77 applies only to discretionary grants and cooperative agreements awarded **on or before** September 30, 1994. Section citations from Part 74 refer to the version of that part that begins on page 1 of this book.)

PART 77-DEFINITIONS THAT APPLY TO DEPARTMENT REGULATIONS

§ 77.1 Definitions that apply to all Department programs.

(a) [Reserved]

(b) Unless a statute or regulation provides otherwise, the following definitions in part 74 of this title apply to the regulations in Title 34 of the Code of Federal Regulations. The section of part 74 that contains the definition is given in parentheses.

Budget (74.104)
Contract (includes definition of "Subcontract") (74.3)
Equipment (74.132)
Federally recognized Indian tribal government (74.3)
Grant (74.3)
Grantee (74.3)
Local government (74.3)
Personal property (74.132)
Real property (74.132)
Recipient (74.3)
Subgrant (74.3)
Subgrantee (74.3)
Supplies (74.132)

(c) Unless a statute or regulation provides otherwise, the following definitions also apply to the regulations in this title:

Acquisition means taking ownership of property, receiving the property as a gift, entering into a lease-purchase arrangement, or leasing the property. The term includes processing, delivery, and installation of property.

Applicant means a party requesting a grant or subgrant under a program of the Department.

Application means a request for a grant or subgrant under a program of the Department.

Award means an amount of funds that the Department provides under a contract, grant, or cooperative agreement.

Budget period means an interval of time into which a project period is divided for budgetary purposes.

Department means the U.S. Department of Education.

Director of the Institute of Museum Services means the Director of the Institute of Museum Services or an officer or employee of the Institute of Museum Services acting for the Director under a delegation of authority.

Director of the National Institute of Education means the Director of the National Institute of Education or an officer or employee of the National Institute of Education acting for the Director under a delegation of authority.

ED means the U.S. Department of Education.

EDGAR means the Education Department General Administrative Regulations (34 CFR parts 74, 75, 76, 77, 79, 80, 81, 82, 85, and 86.)

Elementary school means a day or residential school that provides elementary education, as determined under State law.

Facilities means one or more structures in one or more locations.

Fiscal year means the Federal fiscal year-a period beginning on October 1 and ending on the following September 30.

GEPA means The General Education Provisions Act.

Grant period means the period for which funds have been awarded.

Local educational agency means:

(a) A public board of education or other public authority legally constituted within a State for either administrative control of or direction of, or to perform service functions for, public elementary or secondary schools in:

(1) A city, county, township, school district, or other political subdivision of a State; or

(2) Such combination of school districts or counties a State recognizes as an administrative agency for its public elementary or secondary schools; or

(b) Any other public institution or agency that has administrative control and direction of a public elementary or secondary school.

(c) As used in 34 CFR parts 400, 408, 525, 526 and 527 (vocational education programs), the term also includes any other public institution or agency that has administrative control and direction of a vocational education program.

Minor remodeling means minor alterations in a previously completed building. The term also includes the extension of utility lines, such as water and electricity, from points beyond the confines of the space in which the minor remodeling is undertaken but within the confines of the previously completed building. The term does not include building construction, structural alterations to buildings, building maintenance, or repairs.

Nonprofit, as applied to an agency, organization, or institution, means that it is owned and operated by one or more corporations or associations whose net earnings do not benefit, and cannot lawfully benefit, any private shareholder or entity.

Nonpublic, as applied to an agency, organization, or institution, means that the agency, organization, or institution is nonprofit and is not under Federal or public supervision or control.

Preschool means the educational level from a child's birth to the time at which the State provides elementary education.

Private, as applied to an agency, organization, or institution, means that it is not under Federal or public supervision or control.

Project means the activity described in an application.

Project period means the period for which the appropriate official of the Department approves a project.

Public, as applied to an agency, organization, or institution, means that the agency, organization, or institution is under the administrative supervision or control of a government other than the Federal Government.

Secondary school means a day or residential school that provides secondary education as determined under State law. In the absence of State law, the Secretary may determine, with respect to that State, whether the term includes education beyond the twelfth grade.

Secretary means the Secretary of the Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

Service function, with respect to a local educational agency:

(a) Means an educational service that is performed by a legal entity-such as an intermediate agency:

(1) (i) Whose jurisdiction does not extend to the whole State; and

(ii) That is authorized to provide consultative, advisory, or educational services to public elementary or secondary schools; or

(2) That has regulatory functions over agencies having administrative control or direction of public elementary or secondary schools.

(b) The term does not include a service that is performed by a cultural or educational resource.

State means any of the 50 States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

State educational agency means the State board of education or other agency or officer primarily responsible for the supervision of public elementary and secondary schools in a State. In the absence of this officer or agency, it is an officer or agency designated by the Governor or State law.

Work of art means an item that is incorporated into facilities primarily because of its aesthetic value.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474)

[45 FR 22529, Apr. 3, 1980, as amended at 45 FR 37442, June 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86298, Dec. 30, 1980; 54 FR 21776, May 19, 1989; 57 FR 30342, July 8, 1992]

(**NOTE:** The following version of Part 77 contains amendments published in the *Federal Register* on July 6, 1994 [59 FR 34739] and applies only to discretionary grants and cooperative agreements awarded **on or after** October 1, 1994. Section citations from Part 74 refer to the revised version of that part, published in the *Federal Register* on the same date [59 FR 34722], a copy of which begins on page 43 of this book.

PART 77-DEFINITIONS THAT APPLY TO DEPARTMENT REGULATIONS

§ 77.1 Definitions that apply to all Department programs.

(a) [Reserved]

(b) Unless a statute or regulation provides otherwise, the following definitions in part 74 or 80 of this title apply to the regulations in Title 34 of the Code of Federal Regulations. The section of part 74 or 80 that contains the definition is given in parentheses.

Award (§ 74.2)
Contract (includes definition of "Subcontract") (§ 74.2) (§ 80.3)
Equipment (§ 74.2) (§ 80.3)
Grant (§ 80.3)
Personal property (§ 74.2)
Project period (§ 74.2)
Real property (§ 74.2) (§ 80.3)
Recipient (§ 74.2)
Supplies (§ 74.2) (§ 80.3)

(c) Unless a statute or regulation provides otherwise, the following definitions also apply to the regulations in this title:

Acquisition means taking ownership of property, receiving the property as a gift, entering into a lease-purchase arrangement, or leasing the property. The term includes processing, delivery, and installation of property.

Applicant means a party requesting a grant or subgrant under a program of the Department.

Application means a request for a grant or subgrant under a program of the Department.

Award means an amount of funds that the Department provides under a contract, grant, or cooperative agreement.

Budget means that recipient's financial plan for carrying out the project or program.

Budget period means an interval of time into which a project period is divided for budgetary purposes.

Department means the U.S. Department of Education.

Director of the Institute of Museum Services means the Director of the Institute of Museum Services or an officer or employee of the Institute of Museum Services acting for the Director under a delegation of authority.

Director of the National Institute of Education means the Director of the National Institute of Education or an officer or employee of the National Institute of Education acting for the Director under a delegation of authority.

ED means the U.S. Department of Education.

EDGAR means the Education Department General Administrative Regulations (34 CFR parts 74, 75, 76, 77, 79, 80, 81, 82, 85, and 86.)

Elementary school means a day or residential school that provides elementary education, as determined under State law.

Facilities means one or more structures in one or more locations.

Fiscal year means the Federal fiscal year-a period beginning on October 1 and ending on the following September 30.

GEPA means The General Education Provisions Act.

Grantee means the legal entity other than a Government subject to 34 CFR Part 80 to which a grant is awarded and which is accountable to the Federal Government for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the award document. For example, a grant award document may name as the grantee one school or campus of a university. In this case, the granting agency usually intends, or actually intends, that the named component assume primary or sole responsibility for administering the grant-assisted project or program. Nevertheless, the naming of a component of a legal entity as the grantee in a grant award document shall not be construed as relieving the whole legal entity from accountability to the Federal Government for the use of the funds provided. (This definition is not intended to affect the eligibility provision of grant programs in which eligibility is limited to organizations which may be only components of a legal entity.) The term "grantee" does not include any secondary recipients such as subgrantees, contractors, etc., who may receive funds from a grantee pursuant to a grant. The definition of "grantee" for State, local, and tribal governments is contained in 34 CFR 80.3.

Grant period means the period for which funds have been awarded.

Local educational agency means:

(a) A public board of education or other public authority legally constituted within a State for either administrative control of or direction of, or to perform service functions for, public elementary or secondary schools in:

(1) A city, county, township, school district, or other political subdivision of a State; or

(2) Such combination of school districts or counties a State recognizes as an administrative agency for its public elementary or secondary schools; or

(b) Any other public institution or agency that has administrative control and direction of a public elementary or secondary school.

(c) As used in 34 CFR parts 400, 408, 525, 526 and 527 (vocational education programs), the term also includes any other public institution or agency that has administrative control and direction of a vocational education program.

Minor remodeling means minor alterations in a previously completed building. The term also includes the extension of utility lines, such as water and electricity, from points beyond the confines of the space in which the minor remodeling is undertaken but within the confines of the previously completed building. The term does not include building construction, structural alterations to buildings, building maintenance, or repairs.

Nonprofit, as applied to an agency, organization, or institution, means that it is owned and operated by one or more corporations or associations whose net earnings do not benefit, and cannot lawfully benefit, any private shareholder or entity.

Nonpublic, as applied to an agency, organization, or institution, means that the agency, organization, or institution is nonprofit and is not under Federal or public supervision or control.

Preschool means the educational level from a child's birth to the time at which the State provides elementary education.

Private, as applied to an agency, organization, or institution, means that it is not under Federal or public supervision or control.

Project means the activity described in an application.

Project period means the period for which the appropriate official of the Department approves a project.

Public, as applied to an agency, organization, or institution, means that the agency, organization, or institution is under the administrative supervision or control of a government other than the Federal Government.

Secondary school means a day or residential school that provides secondary education as determined under State law. In the absence of State law, the Secretary may determine, with respect to that State, whether the term includes education beyond the twelfth grade.

Secretary means the Secretary of the Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

Service function, with respect to a local educational agency:

(a) Means an educational service that is performed by a legal entity-such as an intermediate agency:

(1) (i) Whose jurisdiction does not extend to the whole State; and

(ii) That is authorized to provide consultative, advisory, or educational services to public elementary or secondary schools; or

(2) That has regulatory functions over agencies having administrative control or direction of public elementary or secondary schools.

(b) The term does not include a service that is performed by a cultural or educational resource.

State means any of the 50 States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

State educational agency means the State board of education or other agency or officer primarily responsible for the supervision of public elementary and secondary schools in a State. In the absence of this officer or agency, it is an officer or agency designated by the Governor or State law.

Work of art means an item that is incorporated into facilities primarily because of its aesthetic value.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474)

[45 FR 22529, Apr. 3, 1980, as amended at 45 FR 37442, June 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86298, Dec. 30, 1980; 54 FR 21776, May 19, 1989; 57 FR 30342, July 8, 1992]

PART 79-INTERGOVERNMENTAL REVIEW OF DEPARTMENT OF EDUCATION PROGRAMS AND ACTIVITIES

79.1 What is the purpose of these regulations?
79.2 What definitions apply to these regulations?
79.3 What programs and activities of the Department are subject to these regulations?
79.4 What are the Secretary's general responsibilities under the Order?
79.5 What is the Secretary's obligation with respect to federal interagency coordinations?
79.6 What procedures apply to the selection of programs and activities under these regulations?
79.7 How does the Secretary communicate with state and local officials concerning the Department's programs and activities?
79.8 How does the Secretary provide states an opportunity to comment on proposed federal financial assistance?
79.9 How does the Secretary receive and respond to comments?
79.10 How does the Secretary make efforts to accommodate intergovernmental concerns?
79.11 What are the Secretary's obligations in interstate situations?
79.12 How may a state simplify, consolidate, or substitute federally required state plans?
79.13 [Reserved]

AUTHORITY: 31 U.S.C. 6506; 42 U.S.C. 3334; and E.O. 12372, unless otherwise noted.

SOURCE: 48 FR 29166, June 24, 1983, unless otherwise noted.

§ 79.1 What is the purpose of these regulations?

(a) The regulations in this part implement Executive Order 12372, "Intergovernmental Review of Federal Programs," issued July 14, 1982 and amended on April 8, 1983. These regulations also implement applicable provisions of Section 401 of the Intergovernmental Cooperation Act of 1968 and Section 204 of the Demonstration Cities and Metropolitan Development Act of 1966.

(b) These regulations are intended to foster an intergovernmental partnership and a strengthened Federalism by relying on state processes and on state, areawide, regional, and local coordination for review of proposed federal financial assistance.

(c) These regulations are intended to aid the internal management of the Department, and are not intended to create any right or benefit enforceable at law by a party against the Department or its officers.

(Authority: E.O. 12372)

§ 79.2 What definitions apply to these regulations?

Department means the U.S. Department of Education.

Order means Executive Order 12372, issued July 14, 1982, amended April 8, 1983, and titled "Intergovernmental Review of Federal Programs."

Secretary means the Secretary of the U.S. Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

State means any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands, or the Trust Territory of the Pacific Islands.

(Authority: E.O. 12372)

§ 79.3 What programs and activities of the Department are subject to these regulations?

(a) The Secretary publishes in the *Federal Register* a list of the Department's programs and activities that are subject to these regulations and identifies which of these are subject to the requirements of section 204 of the Demonstration Cities and Metropolitan Development Act.

(b) If a program or activity of the Department that provides Federal financial assistance does not have implementing regulations, the regulations in this part apply to that program or activity.

(c) The following programs and activities are excluded from coverage under this part:

(1) Proposed legislation.

(2) Regulation and budget formulation.

(3) National security matters.

(4) Procurement.

(5) Direct payments to individuals.

(6) Financial transfers for which the Department has no funding discretion or direct authority to approve specific sites or projects (e.g., block grants under Chapter 2 of the Education Consolidation and Improvement Act of 1981).

(7) Research and development national in scope.

(8) Assistance to federally recognized Indian tribes.

(d) In addition to the programs and activities excluded in paragraph (c) of this section, the Secretary may only exclude a Federal financial assistance program or activity from coverage under this part if the program or activity does not directly affect State or local governments.

(Authority: E.O. 12372)

[48 FR 29166, June 24, 1983, as amended at 51 FR 20824, June 9, 1986]

§ 79.4 What are the Secretary's general responsibilities under the Order?

(a) The Secretary provides opportunities for consultation by elected officials of those state and local governments that would provide the nonfederal funds for, or that would be directly affected by, proposed federal financial assistance from the Department.

(b) If a state adopts a process under the Order to review and coordinate proposed federal financial assistance, the Secretary, to the extent permitted by law:

(1) Uses the state process to determine official views of state and local elected officials;

(2) Communicates with state and local elected officials as early in a program planning cycle as is reasonably feasible to explain specific plans and actions;

(3) Makes efforts to accommodate state and local elected official's concerns with proposed federal financial assistance that

are communicated through the state process;

(4) Allows the states to simplify and consolidate existing federally required state plan submissions;

(5) Where state planning and budgeting systems are sufficient and where permitted by law, encourages the substitution of state plans for federally required state plans;

(6) Seeks the coordination of views of affected state and local elected officials in one state with those of another state when proposed federal financial assistance has an impact on interstate metropolitan urban centers or other interstate areas; and

(7) Supports state and local governments by discouraging the reauthorization or creation of any planning organization which is federally funded, which has a limited purpose, and which is not adequately representative of, or accountable to, state or local elected officials.

(Authority: E.O. 12372, Sec. 2)

§ 79.5 What is the Secretary's obligation with respect to federal interagency coordination?

The Secretary, to the maximum extent practicable, consults with and seeks advice from all other substantially affected federal departments and agencies in an effort to assure full coordination between such agencies and the Department regarding programs and activities covered under these regulations.

(Authority: E.O. 12372)

§ 79.6 What procedures apply to the selection of programs and activities under these regulations?

(a) A state may select any program or activity published in the *Federal Register* in accordance with §79.3 for intergovernmental review under these regulations. Each state, before selecting programs and activities, shall consult with local elected officials.

(b) Each state that adopts a process shall notify the Secretary of the Department's programs and activities selected for that process.

(c) A state may notify the Secretary of changes in its selections at any time. For each change, the state shall submit to the Secretary an assurance that the state has consulted with local elected officials regarding the change. The Department may establish deadlines by which states are required to inform the Secretary of changes in their program selections.

(d) The Secretary uses a state's process as soon as feasible, depending on individual programs and activities, after the Secretary is notified of its selections.

(Authority: E.O. 12372, sec. 2)

§ 79.7 How does the Secretary communicate with state and local officials concerning the Department's programs and activities?

(a) [Reserved]

(b) (1) The Secretary provides notice to directly affected state, areawide, regional, and local entities in a state of proposed federal financial assistance if:

(i) The state has not adopted a process under the Order; or

(ii) The assistance involves a program or activity not selected for the state process.

(2) This notice may be made by publication in the *Federal Register* or other means which the Secretary determine appropriate.

(Authority: E.O. 12372, Sec. 2)

§ 79.8 How does the Secretary provide states an opportunity to comment on proposed federal financial assistance?

(a) Except in unusual circumstances, the Secretary gives State processes or directly affected State, areawide, regional, and local officials and entities-

(1) At least 30 days to comment on proposed Federal financial assistance in the form of noncompeting continuation awards; and

(2) At least 60 days to comment on proposed Federal financial assistance other than noncompeting continuation awards.

(b) The Secretary establishes a date for mailing or hand-delivering comments under paragraph (a) of this section using one of the following two procedures:

(1) If the comments relate to continuation award applications, the Secretary notifies each applicant and each State Single Point of Contact (SPOC) of the date by which SPOC comments should be submitted.

(2) If the comments relate to applications for new grants, the Secretary establishes the date in a notice published in the *Federal Register*.

(c) This section also applies to comments in cases in which the review, coordination, and communication with the Department have been delegated.

(d) Applicants for programs and activities subject to Section 204 of the Demonstration Cities and Metropolitan Act shall allow areawide agencies a 60-day opportunity for review and comment.

(Authority: E.O. 12372, Sec. 2)

[48 FR 29166, June 24, 1983, as amended at 51 FR 20825, June 9, 1986]

§ 79.9 How does the Secretary receive and respond to comments?

(a) The Secretary follows the procedure in §79.10 if:

(1) A state office or official is designated to act as a single point of contact between a state process and all federal agencies, and

(2) That office or official transmits a State process recommendation, and identifies it as such, for a program selected under §79.6.

(b) (1) The single point of contact is not obligated to transmit comments from state, areawide, regional, or local officials and entities if there is no state process recommendation.

(2) If a state process recommendation is transmitted by a single point of contact, all comments from state, areawide, regional, and local officials and entities that differ from it must also be transmitted.

(c) If a state has not established a process, or is unable to submit a state process recommendation, state, areawide, regional, and local officials and entities may submit comments to the Department.

(d) If a program or activity is not selected for a state process, state, areawide, regional, and local officials and entities may submit comments to the Department. In addition, if a state process recommendation for a nonselected program or activity is transmitted to the Department by the single point of contact, the Secretary follows the procedures of §79.10.

(e) The Secretary considers comments which do not constitute a state process recommendation submitted under these regulations and for which the Secretary is not required to apply the procedures of §79.10 of this part, if those comments are provided by a single point of contact, or directly to the Department by a commenting party.

(Authority: E.O. 12372, Sec. 2)

[48 FR 29166, June 24, 1983, as amended at 51 FR 20825, June 9, 1986]

§ 79.10 How does the Secretary make efforts to accommodate intergovernmental concerns?

(a) If a state process provides a state process recommendation to the Department through its single point of contact, the Secretary either:

(1) Accepts the recommendation;

(2) Reaches a mutually agreeable solution with the state process; or

(3) Provides the single point of contact with a written explanation of the decision in such form as the Secretary deems appropriate. The Secretary may also supplement the written explanation by providing the explanation to the single point of contact by telephone, other telecommunication, or other means.

(b) In any explanation under paragraph (a)(3) of this section, the Secretary informs the single point of contact that:

(1) The Department will not implement its decision for at least ten days after the single point of contact receives the explanation; or

(2) The Secretary has reviewed the decision and determined that, because of unusual circumstances, the waiting period of at least ten days is not feasible.

(c) For purposes of computing the waiting period under paragraph (b)(1) of this section, a single point of contact is presumed to have received written notification 5 days after the date of mailing of the notification.

(Authority: E.O. 12372, Sec. 2)

§ 79.11 What are the Secretary's obligations in interstate situations?

(a) The Secretary is responsible for:

(1) Identifying proposed federal financial assistance that has an impact on interstate areas;

(2) Notifying appropriate officials and entities in states which have adopted a process and which select the Department's program or activity.

(3) Making efforts to identify and notify the affected state, areawide, regional, and local officials and entities in those states that have not adopted a process under the Order or do not select the Department's program or activity;

(4) Responding under §79.10 if the Secretary receives a recommendation from

a designated areawide agency transmitted by a single point of contact, in cases in which the review, coordination, and communication with the Department have been delegated.

(b) In an interstate situation subject to this section, the Secretary uses the procedures in §79.10 if a state process provides a state process recommendation to the Department through a single point of contact.

(Authority: E.O. 12372, Sec. 2(e))

§ 79.12 How may a state simplify, consolidate, or substitute federally required state plans?

(a) As used in this section:

(1) *Simplify* means that a state may develop its own format, choose its own submission date, and select the planning period for a state plan.

(2) *Consolidate* means that a state may meet statutory and regulatory requirements by combining two or more plans into one document and that the state can select the format, submission date, and planning period for the consolidated plan.

(3) *Substitute* means that a state may use a plan or other document that it has developed for its own purposes to meet Federal requirements.

(b) If not inconsistent with law, a state may decide to try to simplify, consolidate, or substitute federally required state plans without prior approval by the Secretary.

(c) The Secretary reviews each state plan that a state has simplified, consolidated, or substituted and accepts the plan only if its contents meet federal requirements.

(Authority: E.O. 12372, sec. 2)

§ 79.13 [Reserved]

PART 80-UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

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APPENDIX TO PART 80--
AUDIT REQUIREMENTS FOR STATE AND LOCAL GOVERNMENTS

Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circular A-102, unless otherwise noted.

SOURCE: 53 FR 8071 and 8087, Mar. 11, 1988, unless otherwise noted.

Subpart A-General

§ 80.1 Purpose and scope of this part.

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.2 Scope of subpart.

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.3 Definitions.

As used in this part:

Accrued expenditures mean the charges incurred by the grantee during a given period requiring the provision of funds for: (1) Goods and other tangible property received; (2) services performed by employees, contractors, subgrantees, subcontractors, and other payees; and (3) other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

Accrued income means the sum of: (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and (2) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

Acquisition cost of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

Administrative requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from "*programmatic*" requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

Cash contributions means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

Contract means (except as used in the definitions for "*grant*" and "*subgrant*" in this section and except where qualified by "*Federal*") a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

Cost sharing or matching means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

Cost-type contract means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

Equipment means tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

Expenditure report means: (1) For nonconstruction grants, the SF-269 "Financial Status Report" (or other equivalent report); (2) for construction grants, the SF-271 "Outlay Report and Request for Reimbursement" (or other equivalent report).

Federally recognized Indian tribal government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

Government means a State or local government or a federally recognized Indian tribal government.

Grant means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

Grantee means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

Local government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

Obligations means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

OMB means the United States Office of Management and Budget.

Outlays (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of inkind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

Percentage of completion method refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

Prior approval means documentation evidencing consent prior to incurring specific cost.

Real property means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

Share, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted-not the value of third-party in-kind contributions.

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

(1) The definition of "State" in this section is used for the purpose of determining the scope of part 80 regulations. Some program regulations contain different definitions for "State" based on program statute eligibility requirements.

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of "*grant*" in this part.

Subgrantee means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

Supplies means all tangible personal property other than "*equipment*" as defined in this part.

Suspension means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

Termination means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. "*Termination*" does not include: (1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period; (2) Withdrawal of the unobligated balance as of the expiration of a grant; (3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or (4) voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

Terms of a grant or subgrant mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

Third party in-kind contributions mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

Unliquidated obligations for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988]

§80.4 Applicability.

(a) *General.* Subparts A through D of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of §80.6, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, Subtitle D, Chapter 2, Section 583-the Secretary's discretionary grant program) and Titles I-III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and Part C of Title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (Title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)19(G); HHS grants for WIN are subject to this part);

(ii) Child Support Enforcement and Establishment of Paternity (Title IV-D of the Act);

(iii) Foster Care and Adoption Assistance (Title IV-E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI-AABD of the Act); and

(v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96-422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241-1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) *Entitlement programs.* Entitlement programs enumerated above in §80.4(a) (3) through (8) are subject to Subpart E.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.5 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in §80.6.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.6 Additions and exceptions.

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the *Federal Register*.

(b) Exceptions for classes of grants or grantees may be authorized only by the Secretary after consultation with OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

(Authority: 20 U.S.C. 3474; OMB Circular A-102) [53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988]

Subpart B-Pre-Award Requirements

§ 80.10 Forms for applying for grants.

(a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) *Authorized forms and instructions for governmental organizations.* (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or

activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF-424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.11 State plans.

(a) *Scope.* The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, "Intergovernmental Review of Federal Programs," States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive order.

(b) *Requirements.* A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) *Assurances.* In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments.* A State will amend a plan whenever necessary to reflect: (1) New or revised Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.12 Special grant or subgrant conditions for "high-risk" grantees.

(a) A grantee or subgrantee may be considered "high risk" if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the

high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grantee or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

Subpart C-Post-Award Requirements

FINANCIAL ADMINISTRATION

§ 80.20 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to:

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) *Accounting records.* Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control.* Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) *Budget control.* Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required,

estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost.* Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) *Source documentation.* Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management.* Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.21 Payment.

(a) *Scope.* This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR part 205.

(c) *Advances.* Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.* (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless-

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with §80.43(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 et seq.) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to $100 per year for administrative expenses.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.22 Allowable costs.

(a) *Limitation on use of funds.* Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors,

including allowable costs in the form of payments to fixed-price contractors, and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) For each kind of organization, there is a set of Federal principles for determining allowable costs. For the costs of a State, local, or Indian tribal government, the Secretary applies the cost principles in OMB Circular A-87, as amended on June 9, 1987.

For the costs of a --	Use the principles in --
State, local or Indian tribal government.	OMB Circular A - 87
Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A - 122 as not subject to that circular.	OMB Circular A - 122
Educational institutions.	OMB Circular A - 21
For-profit organization other than a hospital and an organization named in OMB Circular A - 122 as not subject to that circular.	48 CFR part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988]

§ 80.23 Period of availability of funds.

(a) *General.* Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations.* A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF-269). The Federal agency may extend this deadline at the request of the grantee.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.24 Matching or cost sharing.

(a) *Basic rule: Costs and contributions acceptable.* With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions*-(1) *Costs borne by other Federal grant agreements.* Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing.* For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements.* Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) *Costs financed by program income.* Costs financed by program income, as defined in §80.25, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in §80.25(g).)

(5) *Services or property financed by income earned by contractors.* Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions.* (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services*-(1) *Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.*

(1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching,

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2)(i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in §80.22, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition.* If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property.* In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474, OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.25 Program income.

(a) *General.* Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income.* Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. "During the grant period" is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income.* If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties.* Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See §80.34.)

(f) *Property.* Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§80.31 and 32.

(g) *Use of program income.* Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) *Deduction.* Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) *Addition.* When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) *Cost sharing or matching.* When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period.* There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

(Authority: 20 U.S.C. 3474, OMB Circular A-102)

§ 80.26 Non-Federal audit.

(a) *Basic rule.* Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act of 1984 (31 U.S.C. 7501-7) and Federal agency implementing regulations. The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

(b) *Subgrantees.* State or local governments, as those terms are defined for purposes of the Single Audit Act, that receive Federal financial assistance and provide $25,000 or more of it in a fiscal year to a subgrantee shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A-133, "Audits of Institutions of Higher Education and Other Nonprofit Institutions" have met the audit requirements in that Circular. Commercial contractors (private for-profit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractor has

complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, OMB Circular A-133, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) *Auditor selection.* In arranging for audit services, §80.36 shall be followed.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circulars A-102, A-128 and A-133)

NOTE: The requirements for non-Federal audits are contained in the Appendix to part 80-Audit Requirements for State and Local Governments.

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988; 56 FR 1698, Jan. 16, 1991]

CHANGES, PROPERTY, AND SUBAWARDS

§ 80.30 Changes.

(a) *General.* Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles.* The applicable cost principles (see §80.22) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes*-(1) *Nonconstruction projects.* Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds $100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) *Construction projects.* Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) *Combined construction and nonconstruction projects.* When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from nonconstruction to construction or vice versa.

(d) *Programmatic changes.* Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of §80.36 but does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements.* The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval.* (1) A request for prior approval of any budget revision will be in the same budget formal the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see §80.22) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.31 Real property.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use.* Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) *Disposition.* When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) *Retention of title.* Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or

subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property.* Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title.* Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

(d) The provisions of paragraph (c) of this section do not apply to disaster assistance under 20 U.S.C. 241-1(b)-(c) and the construction provisions of the Impact Aid Program, 20 U.S.C. 631-647.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988]

§ 80.32 Equipment.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States.* A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in §80.25(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than $5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of $5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment.* In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title.* The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third part named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow §80.32(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase

to the current fair market value of the property.

(h) The provisions of paragraphs (c), (d), (e), and (g) of this section do not apply to disaster assistance under 20 U.S.C. 241-1(b)-(c) and the construction provisions of the Impact Aid Program, 20 U.S.C. 631-647.

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(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988; 53 FR 49143, Dec. 6, 1988]

§ 80.33 Supplies.

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition.* If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.34 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.35 Subawards to debarred and suspended parties.

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension."

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.36 Procurement.

(a) *States.* When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) *Procurement standards.* (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in

accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) *Competition.* (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of §80.36. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed*-(1) *Procurement by small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than $25,000 in the aggregate. If small purchase procurements are used, price or rate quotations will be obtained from an adequate number of qualified sources.

(2) Procurement by *sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in §80.36(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by *competitive proposals.* The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profit, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.* (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2)(i) through (v) of this section.

(f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see §80.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.* (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc., when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed $25,000 and is to be awarded without competition or only one bid or offer is received in response to a solicitation, or

(iii) The procurement, which is expected to exceed $25,000, specifies a "brand name" product, or

(iv) The proposed award over $25,000 is to be awarded to other than the apparent low bidder under a sealed bid procurement, or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than $25,000.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis;

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subcontracts exceeding $100,000, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows.

(1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions.* A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate (Contracts other than small purchases).

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be

effected and the basis for settlement (All contracts in excess of $10,000).

(3) Compliance with Executive Order 11246 of September 24, 1965 entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967 and as supplemented in Department of Labor regulations (41 CFR chapter 60) (All construction contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees).

(4) Compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR part 3) (All contracts and subgrants for construction or repair).

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) as supplemented by Department of Labor regulations (29 CFR part 5) (Construction contracts in excess of $2,000 awarded by grantees and subgrantees when required by Federal grant program legislation).

(6) Compliance with sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts awarded by grantees and subgrantees in excess of $2,000, and in excess of $2,500 for other contracts which involve the employment of mechanics or laborers)

(7) Notice of awarding agency requirements and regulations pertaining to reporting.

(8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clear Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15) (Contracts, subcontracts, and subgrants of amounts in excess of $100,000).

(13) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163).

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(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.37 Subgrants.

(a) *States.* States shall follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with §80.42 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) *All other grantees.* All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this part;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) *Exceptions.* By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

(1) Section 80.10;

(2) Section 80.11;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR part 205, cited in §80.21; and

(4) Section 80.50.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

REPORTS, RECORDS, RETENTION, AND ENFORCEMENT

§ 80.40 Monitoring and reporting program performance.

(a) *Monitoring by grantees.* Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports.* The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports.* For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments.* Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

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(Authority: 20 U.S.C. 3474, OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.41 Financial reporting.

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall

not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extend required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decision making purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report*-(1) *Form*. Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with §80.41(e)(2)(iii).

(2) *Accounting basis*. Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accrual basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency*. The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date*. When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report*-(1) *Form*. (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements*. Forecasts of Federal cash requirements may be required in the "Remarks" section of the report.

(3) *Cash in hands of subgrantees.* When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date.* Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement*-(1) *Advance payments.* Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in §80.41(b)(3).

(e) *Outlay report and request for reimbursement for construction programs.* (1) *Grants that support construction activities paid by reimbursement method.*

(i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in §80.41(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in §80.41(b)(3).

(2) *Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.* (i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by §80.41(b) (3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in §80.41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in §80.41(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by §80.41(b)(2).

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§ 80.42 Retention and access requirements for records.

(a) *Applicability.* (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see §80.36(i)(10).

(b) *Length of retention period.* (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(4) A recipient that receives funds under a program subject to 20 U.S.C. 1232f (section 437 of the General Education Provisions Act) shall retain records for a minimum of five years after the starting date specified in paragraph (c) of this section.

(c) *Starting date of retention period*-(1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage

chargeback rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm.* Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records*-(1) *Records of grantees and subgrantees.* The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) *Restrictions on public access.* The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records. Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988; 53 FR 49143, Dec. 6, 1988]

§ 80.43 Enforcement.

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to "Debarment and Suspension" under E.O. 12549 (see §80.35).

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.44 Termination for convenience.

Except as provided in §80.43 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either §80.43 or paragraph (a) of this section.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

Subpart D-After-the-Grant Requirements

§ 80.50 Closeout.

(a) *General.* The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) *Reports.* Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) *Final performance or progress report.*

(2) *Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF-271) (as applicable).*

(3) *Final request for payment (SF-270) (if applicable).*

(4) *Invention disclosure (if applicable).*

(5) *Federally-owned property report:* In accordance with §80.32(f), a grantee must submit an inventory of all federally

owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment.* The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments.* (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474, OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.51 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in §80.42;

(d) Property management requirements in §§80.31 and 32.; and

(e) Audit requirements in §80.26.

(Authority: 20 U.S.C. 3474, OMB Circular A-102)

§ 80.52 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an administrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

Subpart E-Entitlement [Reserved]

APPENDIX TO PART 80- AUDIT REQUIREMENTS FOR STATE AND LOCAL GOVERNMENT

1. *Purpose.* This appendix is issued pursuant to the Single Audit Act of 1984, Pub. L. 98-502. It establishes audit requirements for State and local governments that receive Federal aid, and defines Federal responsibilities for implementing and monitoring those requirements.

2. *Policy.* The Single Audit Act requires the following:

a. State or local governments that receive $100,000 or more a year in Federal financial assistance shall have an audit made in accordance with this appendix.

b. State or local governments that receive between $25,000 and $100,000 a year shall have an audit made in accordance with this appendix, or in accordance with Federal laws and regulations governing the programs they participate in.

c. State or local governments that receive less than $25,000 a year shall be exempt from compliance with the Act and other Federal audit requirements. These State and local governments shall be governed by audit requirements prescribed by State or local law or regulation.

d. Nothing in this paragraph exempts State or local governments from maintaining records of Federal financial assistance or from providing access to such records to Federal agencies, as provided for in Federal law, including 34 CFR part 74.

3. *Definitions.* For the purposes of this appendix the following definitions from the Single Audit Act apply:

a. *Cognizant agency* means the Federal agency assigned by the Office of Management and Budget to carry out the responsibilities described in paragraph 9 of this appendix.

b. *Federal financial assistance* means assistance provided by a Federal agency in the form of grants, contracts, cooperative agreements, loans, loan guarantees, property, interest subsidies, insurance, or direct appropriations, but does not include direct Federal cash assistance to individuals. It includes awards received directly from Federal agencies, or indirectly through other units of State and local governments.

c. *Federal agency* has the same meaning as the term "agency" in section 551(1) of Title 5, United States Code.

d. *Generally accepted accounting principles* has the meaning specified in the generally accepted government auditing standards.

e. *Generally accepted government auditing standards* means the *Standards For Audits of Government Organizations, Programs, Activities, and Functions,* developed by the Comptroller General, dated February 27, 1981.

f. *Independent auditor* means:

(1) A State or local government auditor who meets the independence standards specified in generally accepted government auditing standards; or

(2) A public accountant who meets such independence standards.

g. *Internal controls* means the plan of organization and methods and procedures adopted by management to ensure that:

(1) Resources use is consistent with laws, regulations, and policies;

(2) Resources are safeguarded against waste, loss, and misuse; and

(3) Reliable data are obtained, maintained, fairly disclosed in reports.

h. *Indian tribe* means any Indian tribe, band , nations, or other organized group or community, including any Alaskan Native village or regional or village corporations (as defined in, or established under, the Alaskan Native Claims Settlement Act) that is reçognized by the United States as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

i. *Local government* means any unit of local government within a State, including a county, a borough, municipality, city, town, township, parish, local public authority, special district, school district, intrastate district, council of governments, and any other instrumentality of local government.

j. *Major Federal Assistance Program,* as defined by Pub. L. 98-502, is described in the Attachment to this appendix.

k. *Public accountants* means those individuals who meet the qualification standards included in generally accepted government auditing standards for personnel performing government audits.

l. *State* means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands, any instrumentality thereof, and any multi-State, regional, or interstate entity that has government functions and any Indian tribe.

m. *Subrecipient* means any person or government department, agency, or establishment that receives Federal financial assistance to carry out a program through a State or local government, but does not include an individual that is a beneficiary of such a program. A subrecipient may also be a direct recipient of Federal financial assistance.

4. *Scope of audit.* The Single Audit Act provides that:

a. The audit shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

b. The audit shall cover the entire operations of a State or local government or, at the option of that government, it may cover departments, agencies or establishments that received, expended, or otherwise administered Federal financial assistance during the year. However, if a State or local government receives $25,000 or more in General Revenue Sharing Funds in a fiscal year, it shall have an audit of its entire operations. A series of audits of individual departments, agencies, and establishments for the same fiscal year may be considered a single audit.

c. Public hospitals and public colleges and universities may be excluded from State and local audits and the requirements of this appendix. However, if such entities are excluded, audits of these entities shall be made in accordance with statutory requirements and the provisions of 34 CFR part 74.

d. The auditor shall determine whether:

(1) The financial statements of the government, department, agency or establishment present fairly its financial position and the results of its financial operations in accordance with generally accepted accounting principles;

(2) The organization has internal accounting and other control systems to provide reasonable assurance that it is managing Federal financial assistance programs in compliance with applicable laws and regulations; and

(3) The organization has complied with laws and regulations that may have material effect on its financial statements and on each major Federal assistance program.

5. *Frequency of audit.* Audits shall be made annually unless the State or local government has, by January 1, 1987, a constitutional or statutory requirement for less frequent audits. For those governments, the cognizant agency shall permit biennial audits, covering both years, if the government so requests. It shall also honor requests for biennial audits by governments that have an administrative policy calling for audits less frequent than annual, but only for fiscal years beginning before January 1, 1987.

6. *Internal control and compliance reviews.* The Single Audit Act requires that the independent auditor determine and report on whether the organization has internal control systems to provide reasonable assurance that it is managing Federal assistance programs in compliance with applicable laws and regulations.

a. *Internal control review.* In order to provide this assurance the auditor must make a study and evaluation of internal control systems used in administering Federal assistance programs. The study and evaluation must be made whether or not the auditor intends to place reliance on such systems. As part of this review, the auditor shall:

(1) Test whether these internal control systems are functioning in accordance with prescribed procedures.

(2) Examine the recipient's system for monitoring subrecipients and obtaining and acting on subrecipient audit reports.

b. *Compliance review.* The law also requires the auditor to determine whether the organization has complied with laws and regulations that may have a material effect on each major Federal assistance program.

(1) In order to determine which major programs are to be tested for compliance, State and local governments shall identify in their accounts all Federal funds received and expended and the programs under which they were received. This shall include funds received directly from Federal agencies and through other State and local governments.

([illegible]) The review must include the selection and testing of a representative number of charges from each major Federal assistance program. The selection and testing of transactions shall be based on the auditor's professional judgment considering such factors as the amount of expenditures for the program and the individual awards; the newness of the program or changes in its conditions; prior experience with the program, particularly as revealed in audits and other evaluations (e.g., inspections, program reviews); the extent to which the program is carried out through subrecipients; the extent to which the program contracts for goods or services; the level to which the program is already subject to program reviews or other forms of independent oversight; the adequacy of the controls for ensuring compliance; the expectation of adherence or lack of adherence to the applicable laws and regulations; and the potential impact of adverse findings.

(a) In making the test of transactions, the auditor shall determine whether:

-The amounts reported as expenditures were for allowable services, and

-The records show that those who received services services* or benefits were eligible to receive them.

(b) In addition to transaction testing, the auditor shall determine whether:

-Matching requirements, levels of effort and earmarking limitations were met,

-Federal financial reports and claims for advances and reimbursements contain information that is supported by the books and records from which the basic financial statements have been prepared, and

-Amounts claimed or used for matching were determined in accordance with 34 CFR part 74, Appendix C "Principles for Determining Costs Applicable to Grants and Contracts with State and Local Governments," and 34 CFR part 74, Subpart G, "Cost Sharing or Matching."

(c) The principal compliance requirements of the largest Federal aid programs may be ascertained by referring to the *Compliance Supplement for Single Audits of State and Local Governments,* issued by OMB and available from the Government Printing Office. For those programs not covered in the Compliance Supplement, the auditor may ascertain compliance requirements by researching the statues, regulations, and agreements governing individual programs.

(3) Transactions related to other Federal assistance programs that are selected in connection with examinations of financial statements and evaluations of internal controls shall be tested for compliance with Federal laws and regulations that apply to such transactions.

7. *Subrecipients.* State or local governments that receive Federal financial assistance and provide $25,000 or more of it in a fiscal year to a subrecipient shall:

a. determine whether State or local subrecipients have met the audit requirements of this appendix and whether subrecipients covered by 34 CFR part 74 have met the requirements of that part.

b. determine whether the subrecipient spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subrecipient made in accordance with this appendix, 34 CFR part 74, or through other means (e.g., program reviews) if the subrecipient has not yet had such an audit;

c. ensure that appropriate corrective action is taken within six months after receipt of the audit report in instances of noncompliance with Federal laws and regulations;

d. consider whether subrecipient audits necessitate adjustment of the recipient's own records; and

e. require each subrecipient to permit independent auditors to have access to the records and financial statements as necessary to comply with this appendix.

8. *Relation to other audit requirements.* The Single Audit Act provides that an audit made in accordance with this appendix shall be in lieu of any financial or financial compliance audit required under individual Federal assistance programs. To the extent that a single audit provides Federal agencies with information and assurances they need to carry out their overall responsibilities, they shall rely upon and use such information. However, a Federal agency shall make any additional audits which are necessary to carry out its responsibilities under Federal law and regulation. Any additional Federal audit effort shall be planned and carried out in such a way as to avoid duplication.

a. The provisions of this appendix do not limit the authority of Federal agencies to make, or contract for audits and evaluations of Federal financial assistance programs, nor do they limit the authority of any Federal agency Inspector General or other Federal audit official.

b. The provisions of this appendix do not authorize any State or local government or subrecipient thereof to constrain Federal agencies, in any manner, from carrying out additional audits.

c. A Federal agency that makes or contracts for audits in addition to the audits made by recipients pursuant to this appendix shall, consistent with other applicable laws and regulations, arrange for funding the cost of such additional audits. Such additional audits include economy and efficiency audits, program results audits, and program evaluations.

9. *Cognizant agency responsibilities.* The Single Audit Act provides for cognizant Federal agencies to oversee the implementation of this appendix.

a. The Office of Management and Budget will assign cognizant agencies for States and their subdivisions and larger local governments and their subdivisions. Other Federal agencies may participate with an assigned cognizant agency, in order to fulfill the cognizant responsibilities. Smaller governments not assigned a cognizant agency will be under the general oversight of the Federal agency that provides them the most funds whether directly or indirectly.

b. A cognizant agency shall have the following responsibilities:

(1) Ensure that audits are made and reports are received in a timely manner and in accordance with the requirements of this appendix.

(2) Provide technical advice and liaison to State and local governments and independent auditors.

(3) Obtain or make quality control reviews of selected audits made by non-Federal audit organizations, and provide the results, when appropriate, to other interested organizations.

(4) Promptly inform other affected Federal agencies and appropriate Federal law enforcement officials of any reported illegal acts or irregularities. They should also inform State or local law enforcement and prosecuting authorities, if not advised by the recipient, or any violation of law within their jurisdiction.

(5) Advise the recipient of audits that have been found not to have met the requirements set forth in this appendix. In such instances, the recipient will be expected to work with the auditor to take corrective action. If corrective action is not taken, the cognizant agency shall notify the recipient and Federal awarding agencies of the facts and make recommendations for followup action. Major inadequacies or repetitive substandard performance of independent auditors shall be referred to appropriate professional bodies for disciplinary action.

(6) Coordinate, to the extent practicable, audits made by or for Federal agencies that are in addition to the audits made pursuant to this appendix, so that the additional audits build upon such audits.

(7) Oversee the resolution of audit findings that affect the programs of more than one agency.

10. *Illegal acts or irregularities.* If the auditor becomes aware of illegal acts or other irregularities, prompt notice shall be given to recipient management officials above the level of involvement. (See also paragraph 11(a)(3) below for the auditor's reporting responsibilities.) The recipient, in turn, shall promptly notify the cognizant agency of the illegal acts or irregularities and of proposed and actual actions, if any. Illegal acts and irregularities include such matters as conflicts of interest, falsification of records or reports, and misappropriations of funds or other assets.

11. *Audit Reports.* Audit reports must be prepared at the completion of the audit. Reports serve many needs of State and local governments as well as meeting the requirements of the Single Audit Act.

a. The audit report shall state that the audit was made in accordance with the provisions of this appendix. The report shall be made up of at least:

(1) The auditor's report on financial statements and on a schedule of Federal assistance; the financial statements; and a schedule of Federal assistance, showing the total expenditures for each Federal assistance program as identified in the *Catalog of Federal Domestic Assistance*. Federal programs or grants that have not been assigned a catalog number shall be identified under the caption "other Federal assistance."

(2) The auditor's report on the study and evaluation of internal control systems must identify the organization's significant internal accounting controls, and those controls designed to provide reasonable assurance that Federal programs are being managed in compliance with laws and regulations. It must also identify the

controls that were evaluated, the controls that were not evaluated, and the material weaknesses identified as a result of the evaluation.

(3) The auditor's report on compliance containing:

-A statement of positive assurance with respect to those items tested for compliance, including compliance with law and regulations pertaining to financial reports and claims for advances and reimbursements;

-Negative assurance on those items not tested;

-A summary of all instances of noncompliance; and

-An identification of total amounts questioned, if any, for each Federal assistance award, as a result of noncompliance.

b. The three parts of the audit report may be bound into a single report, or presented at the same time as separate documents.

c. All fraud abuse, or illegal acts or indications of such acts, including all questioned costs found as the result of these acts that auditors become aware of, should normally be covered in a separate written report submitted in accordance with paragraph 11f.

d. In addition to the audit report, the recipient shall provide comments on the findings and recommendations in the report, including a plan for corrective action taken or planned and comments on the status of corrective action taken on prior findings. If corrective action is not necessary, a statement describing the reason it is not should accompany the audit report.

e. The reports shall be made available by the State or local government for public inspection within 30 days after the completion of the audit.

f. In accordance with generally accepted government audit standards, reports shall be submitted by the auditor to the organization audited and to those requiring or arranging for the audit. In addition, the recipient shall submit copies of the reports to each Federal department or agency that provided Federal assistance funds to the recipient. Subrecipients shall submit copies to recipients that provided them Federal assistance funds. The reports shall be sent within 30 days after the completion of the audit, but no later than one year after the end of the audit period unless a longer period is agreed to with the cognizant agency.

g. Recipients of more than $100,000 in Federal funds shall submit one copy of the audit report within 30 days after issuance to a central clearinghouse to be designated by the Office of Management and Budget. The clearinghouse will keep completed audits on file and follow up with State and local governments that have not submitted required audit reports.

h. Recipients shall keep audit reports on file for three years from their issuance.

12. *Audit Resolution.* As provided in paragraph 9, the cognizant agency shall be responsible for monitoring the resolution of audit findings that affect the programs of more than one Federal agency. Resolution of findings that relate to the programs of a single Federal agency will be the responsibility of the recipient and that agency. Alternate arrangements may be made on a case-by-case basis by agreement among the agencies concerned.

Resolution shall be made within six months after receipt of the report by the Federal departments and agencies. Corrective action should proceed as rapidly as possible.

13. *Audit workpapers and reports.* Workpapers and reports shall be retained

for a minimum of three years from the date of the audit report, unless the auditor is notified in writing by the cognizant agency to extent the retention period. Audit workpapers shall be made available upon request to the cognizant agency or its designee or the General Accounting Office, at the completion of the audit.

14. *Audit Costs.* The cost of audits made in accordance with the provisions of this appendix are allowable charges to Federal assistance programs.

a. The charges may be considered a direct cost or an allocated indirect cost, determined in accordance with the provisions of 34 CFR part 74, Appendix C, "Principles for Determining Costs Applicable to Grants and Contracts with State and Local Governments."

b. Generally, the percentage of costs charged to Federal assistance programs for a single audit shall not exceed the percentage that Federal funds expended represent of total funds expended by the recipient during the fiscal year. The percentage may be exceeded, however, if appropriate documentation demonstrates higher actual cost.

15. *Sanctions.* The Single Audit Act provides that no cost may be charged to Federal assistance programs for audits required by the Act that are not made in accordance with this appendix. In cases of continued inability or unwillingness to have a proper audit, Federal agencies must consider other appropriate sanctions including:

-Withholding a percentage of assistance payments until the audit is completed satisfactorily,

-Withholding or disallowing overhead costs, and

-Suspending the Federal assistance agreement until the audit is made.

16. *Auditor Selection.* In arranging for audit services State and local governments shall follow the procurement standards prescribed by 34 CFR part 74, Subpart P, "Procurement Standards." The standards provide that while recipients are encouraged to enter into intergovernmental agreements for audit and other services, analysis should be made to determine whether it would be more economical to purchase the services from private firms. In instances where use of such intergovernmental agreements are required by State statutes (e.g., audit services) these statutes will take precedence.

17. *Small and Minority Audit Firms.* Small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in contracts awarded to fulfill the requirements of this appendix. Recipients of Federal assistance shall take the following steps to further this goal:

a. Assure that small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals are used to the fullest extent practicable.

b. Make information on forthcoming opportunities available and arrange timeframes for the audit so as to encourage and facilitate participation by small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals.

c. Consider in the contract process whether firms competing for larger audits intend to subcontract with small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals.

d. Encourage contracting with small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals which have traditionally audited government programs and, in such cases where this is not possible, assure that these firms are given consideration for audit subcontracting opportunities.

e. Encourage contracting with consortiums of small audit firms as described in paragraph (a) above when a contract is too large for an individual small audit firm or audit firm owned and controlled by socially and economically disadvantaged individuals.

f. Use the services and assistance, as appropriate, of such organizations as the Small Business Administration, in the solicitation and utilization of small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals.

ATTACHMENT TO APPENDIX

Definition of Major Program as Provided in Pub. L. 98-502

"Major Federal Assistance Program," for State and local governments having Federal assistance expenditures between $100,000 and $100,000,000, means any program for which Federal expenditures during the applicable year exceed the larger of $300,000, or 3 percent of such total expenditures.

Where total expenditures of Federal assistance exceed $100,000,000, the following criteria apply:

Total expenditures of Federal financial assistance for all programs		Major Federal assistance program means any program that exceeds
More than	But less than	
$100 million	$1 billion	$3 million
$1 billion	$2 billion	$4 million
$2 billion	$3 billion	$7 million
$3 billion	$4 billion	$10 million
$4 billion	$5 billion	$13 million
$5 billion	$6 billion	$16 million
$6 billion	$7 billion	$19 million
Over $7 billion		$20 million

[50 FR 37358, Sept. 13, 1985. Redesignated at 53 FR 8072, Mar. 11, 1988]

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81.35 Collection of claims.

APPENDIX TO PART 81--ILLUSTRATIONS OF PROPORTIONALITY

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234-1234i, 3474(a), unless otherwise noted.

SOURCE: 54 FR 19512, May 5, 1989, unless otherwise noted.

Subpart A-General Provisions

§ 81.1 Purpose.

The regulations in this part govern the enforcement of legal requirements under applicable programs administered by the Department of Education and implement Part E of the General Education Provisions Act (GEPA).

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.2 Definitions.

The following definitions apply to the terms used in this part:

Administrative Law Judge (ALJ) means a judge appointed by the Secretary in accordance with section 451 (b) and (c) of GEPA.

Applicable program means any program for which the Secretary of Education has administrative responsibility, except a program authorized by-

(a) The Higher Education Act of 1965, as amended;

(b) The Act of September 30, 1950 (Pub. L. 874, 81st Congress), as amended; or

(c) The Act of September 23, 1950 (Pub. L. 815, 81st Congress), as amended.

Department means the United States Department of Education.

Disallowance decision means the decision of an authorized Departmental official that a recipient must return funds because it made an expenditure of funds that was not allowable or otherwise failed to discharge its obligation to account properly for funds. Such a decision, referred to as a "preliminary departmental decision" in section 452 of GEPA, is subject to review by the Office of Administrative Law Judges.

Party means either of the following:

(a) A recipient that appeals a decision.

(b) An authorized Departmental official who issues a decision that is appealed.

Recipient means the recipient of a grant or cooperative agreement under an applicable program.

Secretary means the United States Secretary of Education.

(Authority: 20 U.S.C. 1221e-3(a)(1); 1234 (b), (c), and (f)(1); 1234a(a)(1); 1234i; 3474(a))

§ 81.3 Jurisdiction of the Office of Administrative Law Judges.

(a) The Office of Administrative Law Judges (OALJ) established under section 451(a) of GEPA has jurisdiction to conduct the following proceedings concerning an applicable program:

(1) Hearings for recovery of funds.

(2) Withholding hearings.

(3) Cease and desist hearings.

(b) The OALJ also has jurisdiction to conduct other proceedings designated by the Secretary. If a proceeding or class of proceedings is so designated, the Department publishes a notice of the designation in the *Federal Register*.

(Authority: 5 U.S.C. 554, 20 U.S.C. 1234(a))

§ 81.4 Membership and assignment to cases.

(a) The Secretary appoints Administrative Law Judges as members of the OALJ.

(b) The Secretary appoints one of the members of the OALJ to be the chief judge. The chief judge is responsible for the efficient and effective administration of the OALJ.

(c) The chief judge assigns an ALJ to each case or class of cases within the jurisdiction of the OALJ.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234 (b) and (c), 3474(a))

§ 81.5 Authority and responsibility of an Administrative Law Judge.

(a) An ALJ assigned to a case conducts a hearing on the record. The ALJ regulates the course of the proceedings and the conduct of the parties to ensure a fair, expeditious, and economical resolution of the case in accordance with applicable law.

(b) An ALJ is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(c) An ALJ is disqualified in any case in which the ALJ has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or the party's attorney as to make it improper for the ALJ to be assigned to the case.

(d)(1) An ALJ may disqualify himself or herself at any time on the basis of the standards in paragraph (c) of this section.

(2) A party may file a motion to disqualify an ALJ under the standards in paragraph (c) of this section. A motion to disqualify must be accompanied by an affidavit that meets the requirements of 5 U.S.C. 556(b). Upon the filing of such a motion and affidavit, the ALJ decides the

disqualification matter before proceeding further with the case.

(Authority: 5 U.S.C. 556(b); 20 U.S.C. 1221e-3(a)(1); 1234(d), (f)(1), and (g)(1); 3474(a))

§ 81.6 Hearing on the record.

(a) A hearing on the record is a process for the orderly presentation of evidence and arguments by the parties.

(b) Except as otherwise provided in this part or in a notice of designation under §81.3(b), an ALJ conducts the hearing entirely on the basis of briefs and other written submissions unless-

(1) The ALJ determines, after reviewing all appropriate submissions, that an evidentiary hearing is needed to resolve a material factual issue in dispute; or

(2) The ALJ determines, after reviewing all appropriate submissions, that oral argument is needed to clarify the issues in the case.

(c) At a party's request, the ALJ shall confer with the parties in person or by conference telephone call before determining whether an evidentiary hearing or an oral argument is needed.

(Authority: 5 U.S.C. 556(d); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.7 Non-party participation.

(a) A person or organization, other than a party, that wishes to participate in a case shall file an application to participate with the ALJ assigned to the case. The application must-

(1) Identify the case in which participation is sought;

(2) State how the applicant's interest relates to the case;

(3) State how the applicant's participation would aid in the disposition of the case; and

(4) State how the applicant seeks to participate.

(b) The ALJ may permit an applicant to participate if the ALJ determines that the applicant's participation-

(1) Will aid in the disposition of the case;

(2) Will not unduly delay the proceedings; and

(3) Will not prejudice the adjudication of the parties' rights.

(c) If the ALJ permits an applicant to participate, the ALJ permits the applicant to file briefs.

(d) (1) In addition to the participation described in paragraph (c) of this section, the ALJ may permit the applicant to participate in any or all of the following ways:

(i) Submit documentary evidence.

(ii) Participate in an evidentiary hearing afforded the parties.

(iii) Participate in an oral argument afforded the parties.

(2) The ALJ may place appropriate limits on an applicant's participation to ensure the efficient conduct of the proceedings.

(e) A non-party participant shall comply with the requirements for parties in §81.11 and §81.12.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.8 Representation.

A party to, or other participant in, a case may be represented by counsel.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.9 Location of proceedings.

(a) An ALJ may hold conferences of the parties in person or by conference telephone call.

(b) Any conference, hearing, argument, or other proceeding at which the parties are required to appear in person is held in the Washington, DC metropolitan area unless the ALJ determines that the convenience and necessity of the parties or their representatives requires that it be held elsewhere.

(Authority: 5 U.S.C. 554(b); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.10 Ex parte communications.

A party to, or other participant in, a case may not communicate with an ALJ on any fact in issue in the case or on any matter relevant to the merits of the case unless the parties are given notice and an opportunity to participate.

(Authority: 5 U.S.C. 554(d)(1), 557(d)(1)(A); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.11 Motions.

(a) To obtain an order or a ruling from an ALJ, a party shall make a motion to the ALJ.

(b) Except for a request for an extension of time, a motion must be made in writing unless the parties appear in person or participate in a conference telephone call. The ALJ may require a party to reduce an oral motion to writing.

(c) If a party files a motion, the party shall serve a copy of the motion on the other party on the filing date by hand-delivery or by mail. If agreed upon by the parties, service of the motion may be made upon the other party by facsimile transmission.

(d) Except for a request for an extension of time, the ALJ may not grant a party's written motion without the consent of the other party unless the other party has had at least 21 days from the date of service of the motion to respond. However, the ALJ may deny a motion without awaiting a response.

(e) The date of service of a motion is determined by the standards for determining a filing date in §81.12(d).

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

[54 FR 19512, May 5, 1989, as amended at 57 FR 56795, Nov. 30, 1992]

§ 81.12 Filing requirements.

(a) Any written submission to an ALJ or the OALJ under this part must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) If a party files a brief or other document with an ALJ or the OALJ, the party shall serve a copy of the filed material on the other party on the filing date by hand-delivery or by mail. If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(c) Any written submission to an ALJ or the OALJ must be accompanied by a statement certifying the date that the filed material was filed and served on the other party.

(d)(1) The filing date for a written submission to an ALJ or the OALJ is the date the document is-

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission.

(2) If a scheduled filing date falls on a Saturday, Sunday, or Federal holiday, the filing deadline is the next business day

(e) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department

(f) If a document is filed by facsimile transmission, a follow-up hard copy must be filed by hand-delivery or by mail within a reasonable period of time

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

[54 FR 19512, May 5, 1989, as amended at 57 FR 56795, Nov. 30, 1992]

§ 81.13 Mediation.

(a) Voluntary mediation is available for proceedings that are pending before the OALJ

(b) A mediator must be independent of, and agreed to by, the parties to the case

(c) A party may request mediation by filing a motion with the ALJ assigned to the case The OALJ arranges for a mediator if the parties to the case agree to mediation

(d) A party may terminate mediation at any time Mediation is limited to 120 days unless the mediator informs the ALJ that-

(1) The parties are likely to resolve some or all of the dispute, and

(2) An extension of time will facilitate an agreement

(e) The ALJ stays the proceedings during mediation

(f) (1) Evidence of conduct or statements made during mediation is not admissible in any proceeding under this part However, evidence that is otherwise discoverable may not be excluded merely because it was presented during mediation

(2) A mediator may not disclose, in any proceeding under this part, information acquired as a part of his or her official mediation duties that relates to any fact in issue in the case or any matter relevant to the merits of the case

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1) and (h), 3474(a))

§ 81.14 Settlement negotiations.

(a) If the parties to a case file a joint motion requesting a stay of the proceedings for settlement negotiations or the approval of a settlement agreement, the ALJ grants the stay

(b) Evidence of conduct or statements made during settlement negotiations is not admissible in any proceeding under this part However, evidence that is otherwise discoverable may not be excluded merely because it was presented during settlement negotiations

(c) The parties may not disclose the contents of settlement negotiations to the ALJ If the parties enter into a settlement agreement and file a joint motion to dismiss the case, the ALJ grants the motion

(Authority: 20 U.S.C. 554(c)(1), 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.15 Evidence.

(a) The Federal Rules of Evidence do not apply to proceedings under this part However, the ALJ accepts only evidence that is-

(1) Relevant,

(2) Material,

(3) Not unduly repetitious, and

(4) Not inadmissible under §81.13 or §81.14

(b) The ALJ may take official notice of facts that are generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(Authority: 5 U.S.C. 556 (d) and (e); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.16 Discovery.

(a) The parties to a case are encouraged to exchange relevant documents and information voluntarily.

(b) The ALJ, at a party's request, may order compulsory discovery described in paragraph (c) of this section if the ALJ determines that-

(1) The order is necessary to secure a fair, expeditious, and economical resolution of the case;

(2) The discovery requested is likely to elicit relevant information with respect to an issue in the case;

(3) The discovery request was not made primarily for the purposes of delay or harassment; and

(4) The order would serve the ends of justice.

(c) If a compulsory discovery is permissible under paragraph (b) of this section, the ALJ may order a party to do one or more of the following:

(1) Make relevant documents available for inspection and copying by the party making the request.

(2) Answer written interrogatories that inquire into relevant matters.

(3) Have depositions taken.

(d) The ALJ may issue a subpoena to enforce an order described in this section and may apply to the appropriate court of the United States to enforce the subpoena.

(e) The ALJ may not compel the discovery of information that is legally privileged.

(f) (1) The ALJ limits the period for discovery to not more than 90 days but may grant an extension for good cause.

(2) At a party's request, the ALJ may set a specific schedule for discovery.

(Authority: 20 U.S.C. 1234(f)(1) and (g))

§ 81.17 Privileges.

The privilege of a person or governmental organization not to produce documents or provide information in a proceeding under this part is governed by the principles of common law as interpreted by the courts of the United States.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.18 The record.

(a) The ALJ arranges for any evidentiary hearing or oral argument to be recorded and transcribed and the transcript made available to the parties upon request at no charge.

(b) The record of a hearing on the record consists of-

(1) All papers filed in the proceeding;

(2) Documentary evidence admitted by the ALJ;

(3) The transcript of any evidentiary hearing or oral argument; and

(4) Rulings, orders, and subpoenas issued by the ALJ.

(Authority: 5 U.S.C. 556(e), 557(c); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.19 Costs and fees of parties.

The Equal Access to Justice Act, 5 U.S.C. 504, applies by its terms to proceedings under this part. Regulations under that statute are in 34 CFR part 21.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f), 3474(a))

Subpart B-Hearings for Recovery of Funds

§ 81.20 Basis for recovery of funds.

(a) Subject to the provisions of §81.21, an authorized Departmental official requires a recipient to return funds to the Department if-

(1) The recipient made an unallowable expenditure of funds under a grant or cooperative agreement; or

(2) The recipient otherwise failed to discharge its obligation to account properly for funds under a grant or cooperative agreement.

(b) An authorized Departmental official may base a decision to require a recipient to return funds upon an audit report, an investigative report, a monitoring report, or any other evidence.

(Authority: 20 U.S.C. 1234a(a) (1) and (2))

§ 81.21 Measure of recovery.

A recipient that made an unallowable expenditure or otherwise failed to discharge its obligation to account properly for funds shall return an amount that-

(a) Meets the standards for proportionality in §81.22;

(b) In the case of a State or local educational agency, excludes any amount attributable to mitigating circumstances under the standards in §81.23; and

(c) Excludes any amount expended in a manner not authorized by law more than five years before the recipient received the notice of a disallowance decision under §81.24.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(k), 1234b (a) and (b), 3474(a))

[54 FR 19512, May 5, 1989; 54 FR 21622, May 19, 1989]

§ 81.22 Proportionality.

(a)(1) A recipient that made an unallowable expenditure or otherwise failed to account properly for funds shall return an amount that is proportional to the extent of the harm its violation caused to an identifiable Federal interest associated with the program under which it received the grant or cooperative agreement.

(2) An identifiable Federal interest under paragraph (a)(1) of this section includes, but is not limited to, the following:

(i) Serving only eligible beneficiaries.

(ii) Providing only authorized services or benefits.

(iii) Complying with expenditure requirements and conditions, such as set-aside, excess cost, maintenance of effort, comparability, supplement-not-supplant, and matching requirements.

(iv) Preserving the integrity of planning, application, recordkeeping, and reporting requirements.

(v) Maintaining accountability for the use of funds.

(b) The appendix to this part contains examples that illustrate how the standards for proportionality apply. The examples present hypothetical cases and do not represent interpretations of any actual program statute or regulation.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234b(a) and 3474(a))

§ 81.23 Mitigating circumstances.

(a) A recipient that is a State or local educational agency and that has made an unallowable expenditure or otherwise failed to account properly for funds is not required to return any amount that is attributable to the mitigating circumstances described in paragraph (b), (c), or (d) of this section.

(b) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by erroneous written guidance from the department. To prove mitigating circumstances under this paragraph, the recipient shall prove that-

(1) The guidance was provided in response to a specific written request from the recipient that was submitted to the Department at the address provided by notice published in the *Federal Register* under this section;

(2) The guidance was provided by a Departmental official authorized to provide the guidance, as described by that notice;

(3) The recipient actually relied on the guidance as the basis for the conduct that constituted the violation; and

(4) The recipient's reliance on the guidance was reasonable.

(c) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by the Department's failure to provide timely guidance. To prove mitigating circumstances under this paragraph, the recipient shall prove that-

(1) The recipient in good faith submitted a written request for guidance with respect to the legality of a proposed expenditure or practice;

(2) The request was submitted to the Department at the address provided by notice published in the *Federal Register* under this section;

(3) The request-

(i) Accurately described the proposed expenditure or practice; and

(ii) Included the facts necessary for the Department's determination of its legality;

(4) The request contained the certification of the chief legal officer of the appropriate State educational agency that the officer-

(i) Examined the proposed expenditure or practice; and

(ii) Believed it was permissible under State and Federal law applicable at the time of the certification;

(5) The recipient reasonably believed the proposed expenditure or practice was permissible under State and Federal law applicable at the time it submitted the request to the Department;

(6) No Departmental official authorized to provide the requested guidance responded to the request within 90 days of its receipt by the Department; and

(7) The recipient made the proposed expenditure or engaged in the proposed practice after the expiration of the 90-day period.

(d) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by the recipient's compliance with a judicial decree from a court of competent jurisdiction. To prove mitigating circumstances under this paragraph, the recipient shall prove that-

(1) The recipient was legally bound by the decree;

(2) The recipient actually relied on the decree when it engaged in the conduct that constituted the violation; and

(3) The recipient's reliance on the decree was reasonable.

(e) If a Departmental official authorized to provide the requested guidance responds to a request described in paragraph (c) of this section more than 90 days after its receipt, the recipient that made the request shall comply with the guidance at the earliest practicable time.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234b(b), 3474(a))

§ 81.24 Notice of a disallowance decision.

(a) If an authorized Departmental official decides that a recipient must return funds under §81.20, the official gives the recipient written notice of a disallowance decision. The official sends the notice by certified mail, return receipt requested, or other means that ensure proof of receipt.

(b) (1) The notice must state a prima facie case for the recovery of funds.

(2) For the purpose of this section, a prima facie case is a statement of the law and the facts that, unless rebutted, is sufficient to sustain the conclusion drawn in the notice. The facts may be set out in the notice or in a document that is identified in the notice and available to the recipient.

(3) A statement that the recipient failed to maintain records required by law or failed to allow an authorized representative of the Secretary access to those records constitutes a prima facie case for the recovery of the funds affected.

(i) If the recipient failed to maintain records, the statement must briefly describe the types of records that were not maintained and identify the recordkeeping requirement that was violated.

(ii) If the recipient failed to allow access to records, the statement must briefly describe the recipient's actions that constituted the failure and identify the access requirement that was violated.

(c) The notice must inform the recipient that it may-

(1) Obtain a review of the disallowance decision by the OALJ, and

(2) Request mediation under §81.13.

(d) The notice must describe-

(1) The time available to apply for a review of the disallowance decision, and

(2) The procedure for filing an application for review.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(a), 3474(a))

§ 81.25 Reduction of claims.

The Secretary or an authorized Departmental official as appropriate may, after the issuance of a disallowance decision, reduce the amount of a claim established under this subpart by-

(a) Redetermining the claim on the basis of the proper application of the law, including the standards for the measure of recovery under §81.21, to the facts;

(b) Compromising the claim under the Federal Claims Collection Standards in 4 CFR part 103; or

(c) Compromising the claim under §81.26, if applicable.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(j), 3474(a); 31 U.S.C. 3711)

§ 81.26 Compromise of claims under General Education Provision Act.

(a) The Secretary or an authorized Departmental official as appropriate may compromise a claim established under this subpart without following the procedures in 4 CFR part 103 if-

(1) (i) The amount of the claim does not exceed $200,000, or

(ii) The difference between the amount of the claim and the amount agreed to be returned does not exceed $200,000, and

(2) The Secretary or the official determines that-

(i) The collection of the amount by which the claim is reduced under the compromise would not be practical or in the public interest, and

(ii) The practice that resulted in the disallowance decision has been corrected and will not recur.

(b) Not less than 45 days before compromising a claim under this section, the Department publishes a notice in the *Federal Register* stating-

(1) The intention to compromise the claim; and

(2) That interested persons may comment on the proposed compromise.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(j), 3474(a))

§ 81.27 Application for review of a disallowance decision.

(a) If a recipient wishes to obtain review of a disallowance decision, the recipient shall file a written application for review with the OALJ.

(b) A recipient shall file an application for review not later than 30 days after the date it receives the notice of a disallowance decision. Upon receipt of a copy of the filed material, the authorized Departmental official who made the disallowance decision provides the ALJ with a copy of any document identified in the notice under §81.24(b)(2).

(c) An application for review must contain-

(1) A copy of the disallowance decision of which review is sought;

(2) A statement certifying the date the recipient received the notice of that decision;

(3) A short and plain statement of the disputed issues of law and fact, the recipient's position with respect to these issues, and the disallowed funds the recipient contends need not be returned; and

(4) A statement of the facts and the reasons that support the recipient's position.

(d) The ALJ who considers a timely application for review that substantially complies with the requirements of paragraph (c) of this section may permit the recipient to supplement or amend the application with respect to issues that were timely raised. Any requirement to return funds that is not timely appealed becomes the final decision of the Department.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(b)(1), 3474(a))

§ 81.28 Consideration of an application for review.

(a) The ALJ assigned to the case under §81.4 considers an application for review of a disallowance decision.

(b) The ALJ decides whether the notice of a disallowance decision meets the requirements of §81.24, as provided by section 451(e) of GEPA.

(1) If the notice does not meet those requirements, the ALJ-

(i) Returns the notice, as expeditiously as possible, to the authorized Departmental official who made the disallowance decision;

(ii) Gives the official the reasons why the notice does not meet the requirements of §81.24; and

(iii) Informs the recipient of the ALJ's decision by certified mail, return receipt requested.

(2) An authorized Departmental official may modify and reissue a notice that an ALJ returns.

(c) If the notice of a disallowance decision meets the requirements of §81.24, the ALJ decides whether the application for review meets the requirements of §81.27.

(1) If the application, including any supplements or amendments under §81.27(d), does not meet those requirements, the disallowance decision becomes the final decision of the Department.

(2) If the application meets those requirements, the ALJ-

(i) Informs the recipient and the authorized Departmental official that the OALJ has accepted jurisdiction of the case, and

(ii) Schedules a hearing on the record.

(3) The ALJ informs the recipient of the disposition of its application for review by certified mail, return receipt requested. If the ALJ decides that the application does not meet the requirements of §81.27, the ALJ informs the recipient of the reasons for the decision.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(e) and (f)(1), 1234a(b), 3474(a))

§ 81.29 Submission of evidence.

(a) The ALJ schedules the submission of the evidence, whether oral or documentary, to occur within 90 days of the OALJ's receipt of an acceptable application for review under §81.27.

(b) The ALJ may waive the 90-day requirement for good cause.

(Authority: 5 U.S.C. 556(d); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(c), 3474(a))

§ 81.30 Burden of proof.

If the OALJ accepts jurisdiction of a case under §81.28, the recipient shall present its case first and shall have the burden of proving that the recipient is not required to return the amount of funds that the disallowance decision requires to be returned because-

(a) An expenditure identified in the disallowance decision as unallowable was allowable;

(b) The recipient discharged its obligation to account properly for the funds;

(c) The amount required to be returned does not meet the standards for proportionality in §81.22;

(d) The amount required to be returned includes an amount attributable to mitigating circumstances under the standards in §81.23; or

(e) The amount required to be returned includes an amount expended in a manner not authorized by law more than five years before the recipient received the notice of the disallowance decision.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(b)(3), 1234b(b)(1), 3474(a))

§ 81.31 Initial decision.

(a) The ALJ makes an initial decision based on the record.

(b) The initial decision includes the ALJ's findings of fact, conclusions of law, and reasoning on all material issues.

(c) On the day the ALJ makes the initial decision, the ALJ-

(1) Sends the initial decision to the Secretary; and

(2) Sends the initial decision to each of the parties by hand-delivery or by certified mail, return receipt requested.

(d) For the purpose of this part, "initial decision" includes an ALJ's modified decision after the Secretary's remand of a case.

(Authority: 5 U.S.C. 557(c); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.32 Petition for review of an initial decision.

(a) If a party wishes to obtain the Secretary's review of the initial decision of an ALJ, the party files a petition for review with the OALJ, which sends the petition to the Secretary.

(b) A party shall file a petition for review not later than 30 days after the date it receives the initial decision. The party shall file its petition by hand-delivery, by overnight or express mail, or by facsimile transmission.

(c) If a party files a petition for review, the party shall serve a copy of the petition on the other party on the filing date by hand-delivery or by overnight or express mail. If agreed upon by the parties, service of a copy of the petition may be made upon the other party by facsimile transmission.

(d) A petition for review must contain-

(1) The identity of the initial decision of which review is sought, and

(2) A statement of the reasons asserted by the party for affirming the initial decision, modifying it, or setting it aside in whole or in part.

(e) (1) A party may respond to a petition for review by filing a statement of its views on the issues raised in the petition with the OALJ not later than 15 days after the date it receives the petition. The party shall file its response by hand-delivery, by overnight or express mail, or by facsimile transmission. The OALJ sends the statement to the Secretary.

(2) A party shall serve a copy of its statement of views on the other party on the filing date by hand-delivery or by overnight or express mail. If agreed upon by the parties, service of a copy of the response may be made upon the other party by facsimile transmission.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(e), 3474(a))

[54 FR 19512, May 5, 1989; 54 FR 21726, May 19, 1989, as amended at 57 FR 56795, Nov. 30, 1992]

§ 81.33 Review by the Secretary.

(a) The Secretary reviews the initial decision of an ALJ on the petition of a party under §81.32. An interlocutory decision of an ALJ is not subject to review except as a part of a review of the ALJ's initial decision.

(b) The Secretary's review of an initial decision is based on the record of the case, the initial decision, and any proper submissions of the parties or other participants in the case filed during the review process.

(c) (1) The ALJ's findings of fact, if supported by substantial evidence, are conclusive.

(2) The Secretary, for good cause, may remand the case to the ALJ to take further evidence. The ALJ may make new or modified findings of fact and may modify the initial decision. The new or modified findings, if supported by substantial evidence, are conclusive.

(3) A party may not introduce new evidence after an initial decision unless the Secretary determines that extraordinary circumstances made the introduction of the evidence during the proceeding before the ALJ impossible. If the Secretary permits the introduction of new evidence, the Secretary remands the case to the ALJ.

(d) The Secretary, for good cause, may remand the case to the ALJ for further briefing or for clarification or revision of the initial decision.

(e) (1) If the Secretary modifies or sets aside an initial decision, in whole or in part, the Secretary's decision includes a statement of the reasons that support it.

(2) The Secretary gives a decision to modify, remand, or set aside to the OALJ, which sends the decision to each of the parties by hand-delivery or by mail. If the decision is mailed, the OALJ sends it certified mail, return receipt requested.

(Authority: 5 U.S.C. 557(b), 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(d), 3474(a))

[54 FR 19512, May 5, 1989; 54 FR 21726, May 19, 1989]

§ 81.34 Final decision of the Department.

(a) The ALJ's initial decision becomes the final decision of the Department 60 days after the recipient receives the ALJ's decision unless the Secretary modifies, sets aside, or remands the decision during the 60-day period.

(b) If the Secretary modifies or sets aside the ALJ's initial decision, the Secretary's decision becomes the final decision of the Department on the date the recipient receives the Secretary's decision.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(g), 3474(a))

§ 81.35 Collection of claims.

(a) An authorized Departmental official collects a claim established under this subpart by using the standards and procedures in 34 CFR part 30.

(b) A claim established under this subpart may be collected-

(1) 30 days after a recipient receives notice of a disallowance decision if the recipient fails to file an acceptable application for review under §81.27; or

(2) On the date of the final decision of the Department under §81.34 if the recipient obtains review of a disallowance decision.

(c) The Department takes no collection action pending judicial review of a final decision of the Department under section 458 of GEPA.

(d) If a recipient obtains review of a disallowance decision under §81.28, the Department does not collect interest on the claim for the period between the date of the disallowance decision and the date of the final decision of the Department under §81.34.

(Authority: 20 U.S.C. 1234(f)(1), 1234a(f)(1) and (2), (i), and (l))

APPENDIX TO PART 81-ILLUSTRATIONS OF PROPORTIONALITY

(1) *Ineligible beneficiaries.* A State uses 15 percent of its grant to meet the special educational needs of children who were migratory, but who have not migrated for more than five years as a Federal program statute requires for eligibility to participate in the program. Result: Recovery of 15 percent of the grant-all program funds spent for the benefit of those children. Although the services were authorized, the children were not eligible to receive them.

(2) *Ineligible beneficiaries.* A Federal program designed to meet the special educational needs of gifted and talented children requires that at least 80 percent of the children served in any project must be identified as gifted or talented. A local educational agency (LEA) conducts a project in which 76 students are identified as gifted or talented and 24 are not. The project was designed and implemented to meet the special educational needs of gifted and talented students. Result: The LEA must return five percent of the project costs. The LEA provided authorized services for a project in which the 76 target students had to constitute at least 80 percent of the total. Thus, the maximum number of non-target students permitted was 19. Project costs relating to the remaining five students must be returned.

(3) *Ineligible beneficiaries.* Same as the example in paragraph (2), except that only 15 percent of the children were identified as gifted or talented. On the basis of the low percentage of these children and other evidence, the authorized Departmental

official finds that the project as a whole did not address their special educational needs and was outside the purpose of the statute. Result: The LEA must return its entire award. The difference between the required percentage of gifted and talented children and the percentage actually enrolled is so substantial that, if consistent with other evidence, the official may reasonably conclude the entire grant was misused.

(4) *Ineligible beneficiaries.* Same as the example in paragraph (2), except that 60 percent of the children were identified as gifted or talented, and it is not clear whether the project was designed or implemented to meet the special educational needs of these children. Result: If it is determined that the project was designed and implemented to serve their special educational needs, the LEA must return 25 percent of the project costs. A project that included 60 target children would meet the requirement that 80 percent of the children served be gifted and talented if it included no more than 15 other children. Thus, while the LEA provided authorized services, only 75 percent of the beneficiaries were authorized to participate in the project (60 target children and 15 others). If the authorized Departmental official, after examining all the relevant facts, determines that the project was not designed and implemented to serve the special educational needs of gifted or talented students, the LEA must return its entire award because it did not provide services authorized by the statute.

(5) *Unauthorized activities.* An LEA uses ten percent of its grant under a Federal program that authorizes activities only to meet the special educational needs of educationally deprived children to pay for health services that are available to all children in the LEA. All the children who use the Federally funded health services happen to be educationally deprived, and thus eligible to receive program services. Result: Recovery of ten percent of the grant-all program funds spent for the health services. Although the children were eligible to receive program services, the health services were unrelated to a special educational need and, therefore, not authorized by law.

(6) *Set-aside requirement.* A State uses 22 percent of its grant for one fiscal year under a Federal adult education program to provide programs of equivalency to a certificate of graduation from a secondary school. The adult education program statute restricts those programs to no more than 20 percent of the State's grant. Result: Two percent of the State's grant must be returned. Although all 22 percent of the funds supported adult education, the State had no authority to spend more than 20 percent on secondary school equivalency programs.

(7) *Set-aside requirement.* A State uses eight percent of its basic State grant under a Federal vocational education program to pay for the excess cost of vocational education services and activities for handicapped individuals. The program statute requires a State to use ten percent of its basic State grant for this purpose. Result: The State must return two percent of its basic State grant, regardless of how it was used. Because the State was required to spend that two percent on services and activities for handicapped individuals and did not do so, it diverted those funds from their intended purposes, and the Federal interest was harmed to that extent.

(8) *Excess cost requirement.* An LEA uses funds reserved for the disadvantaged under a Federal vocational education program to pay for the cost of the same vocational education services it provides to non-disadvantaged individuals. The program statute requires that funds reserved for the disadvantaged must be used to pay only for the supplemental or additional

costs of vocational education services that are not provided to other individuals and that are required for disadvantaged individuals to participate in vocational education. Result: All the funds spent on the disadvantaged must be returned. Although the funds were spent to serve the disadvantaged, the funds were available to pay for only the supplemental or additional costs of providing services to the disadvantaged.

(9) *Maintenance-of-effort requirement.* An LEA participates in a Federal program in fiscal year 1988 that requires it to maintain its expenditures from non-Federal sources for program purposes to receive its full allotment. The program statute requires that non-Federal funds expended in the first preceding fiscal year must be at least 90 percent of non-Federal funds expended in the second preceding fiscal year and provides for a reduction in grant amount proportional to the shortfall in expenditures. No waiver of the requirement is authorized. In fiscal year 1986 the LEA spent $100,000 from non-Federal sources for program purposes; in fiscal year 1987, only $87,000. Result: The LEA must return 1/30 of its fiscal year 1988 grant-the amount of its grant that equals the proportion of its shortfall ($3,000) to the required level of expenditures ($90,000). If, instead, the statute made maintenance of expenditures a clear condition of the LEA's eligibility to receive funds and did not provide for a proportional reduction in the grant award, the LEA would be required to return its entire grant.

(10) *Supplanting prohibition.* An LEA uses funds under a Federal drug education program to provide drug abuse prevention counseling to students in the eighth grade. The LEA is required to provide that same counseling under State law. Funds under the Federal program statute are subject to a supplement-not-supplant requirement. Result: All the funds used to provide the required counseling to the eighth-grade students must be returned. The Federal funds did not increase the total amount of spending for program purposes because the counseling would have been provided with non-Federal funds if the Federal funds were not available.

(11) *Matching requirement.* A State receives an allotment of $90,000 for fiscal year 1988 under a Federal adult education program. It expends its full allotment and $8,000 from its own resources for adult education. Under the Federal statute, the Federal share of expenditures for the State's program is 90 percent. Result: The State must return the unmatched Federal funds, or $18,000. Expenditure of a $90,000 Federal allotment required $10,000 in matching State expenditures, $2,000 more than the State's actual expenditures. At a ratio of one State dollar for every nine Federal dollars, $18,000 in Federal funds were unmatched.

(12) *Application requirements.* In order to receive funds under a Federal program that supports a wide range of activities designed to improve the quality of elementary and secondary education, an LEA submits an application to its State educational agency (SEA) for a subgrant to carry out school-level basic skills development programs. The LEA submits its application after conducting an assessment of the needs of its students in consultation with parents, teachers, community leaders, and interested members of the general public. The Federal program statute requires the application and consultation processes. The SEA reviews the LEA's application, determines that the proposed programs are sound and the application is in compliance with Federal law, and approves the application. After the LEA receives the subgrant, it unilaterally decides to use 20 percent of the funds for gifted and talented elementary school students-an authorized activity under the Federal statute. However, the LEA

does not consult with interested parties and does not amend its application. Result: 20 percent of the LEA's subgrant must be returned. The LEA had no legal authority to use Federal funds for programs or activities other than those described in its approved application, and its actions with respect to 20 percent of the subgrant not only impaired the integrity of the application process, but caused significant harm to other Federal interests associated with the program as follows: the required planning process was circumvented because the LEA did not consult with the specified local interests, program accountability was impaired because neither the SEA nor the various local interests that were to be consulted had an opportunity to review and comment on the merits of the gifted and talented program activities, and the LEA never had to justify those activities to them, and fiscal accountability was impaired because the SEA and those various local interests were, in effect, misled by the LEA's unamended application regarding the expenditure of Federal funds.

(13) *Harmless violation.* Under a Federal program, a grantee is required to establish a 15-member advisory council of affected teachers, school administrators, parents, and students to assist in program design, monitoring, and evaluation. Although the law requires at least three student members of the council, a grantee's council contains only two. The project is carried out, and no damage to the project attributable to the lack of a third student member can be identified. Result: No financial recovery is required, although the grantee must take other appropriate steps to come into compliance with the law. The grantee's violation has not measurably harmed a Federal interest associated with the program.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234b(a), 3474(a))

[54 FR 19512, May 5, 1989, 54 FR 21622, May 19, 1989]

PART 82-NEW RESTRICTIONS ON LOBBYING

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APPENDIX B TO PART 82-DISCLOSURE FORM TO REPORT LOBBYING

(Authority: Section 319, Pub. L. 101-121 (31 U.S.C. 1352); 20 U.S.C. 3474

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

SOURCE: 55 FR 6737, 6752, Feb. 26, 1990, and 55 FR 26200, June 27, 1990, unless otherwise noted.

Subpart A-General

§ 82.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in Appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in Appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in Appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in Appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ 82.105 Definitions.

For purposes of this part:

(a) *Agency*, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

§ 82.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000, Unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding $100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or,

(4) A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement, shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the

December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either subpart B or C.

Subpart B-Activities by Own Employees

§ 82.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in §82.100(a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Pub. L. 95-507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

§ 82.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in §82.100(a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

§ 82.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C-Activities by Other Than Own Employees

§ 82.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in §82.100(a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in §82.110(a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

Subpart D-Penalties and Enforcement

§ 82.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see Appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $10,000 and $100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

§ 82.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

§ 82.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E-Exemptions

§ 82.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F-Agency Reports

§ 82.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see Appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ 82.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

Pt. 82, App. A

Appendix A to Part 82—CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and

cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

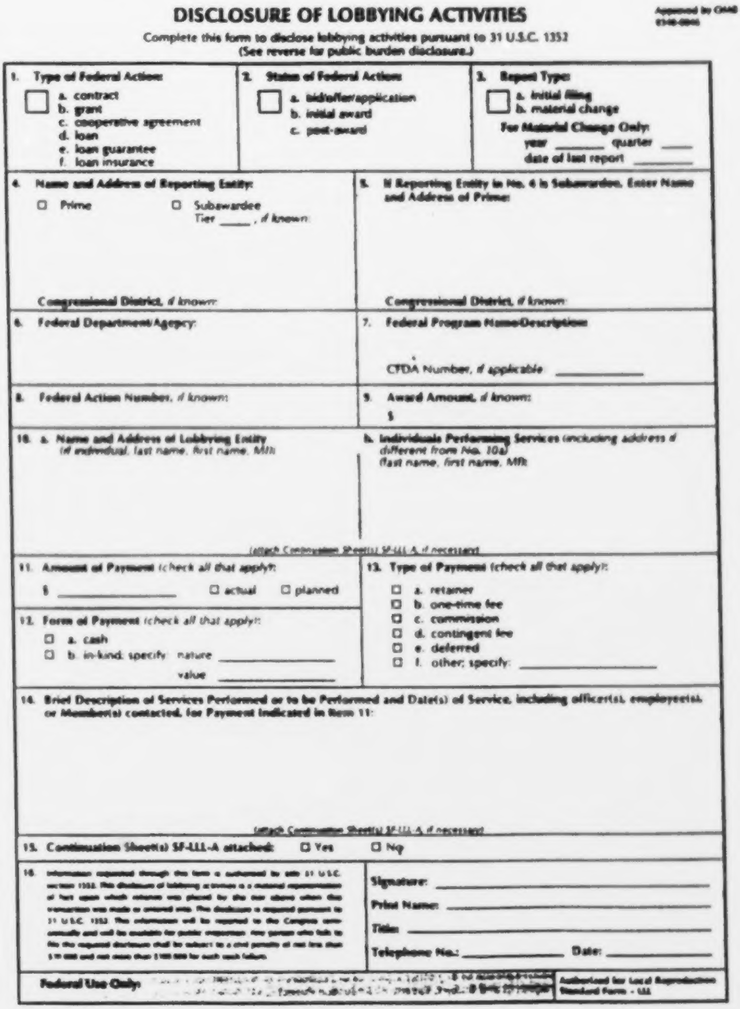
Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

APPENDIX B TO PART 82-DISCLOSURE FORM TO REPORT LOBBYING



DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB [illegible]

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. Type of Federal Action:
☐
a. contract
b. grant
c. cooperative agreement
d. loan
e. loan guarantee
f. loan insurance

2. Status of Federal Action:
☐
a. bid/offer/application
b. initial award
c. post-award

3. Report Type:
☐
a. initial filing
b. material change
For Material Change Only:
year ________ quarter ____
date of last report ________

4. Name and Address of Reporting Entity:
☐ Prime ☐ Subawardee
Tier ____, *if known:*

Congressional District, *if known:*

5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:

Congressional District, *if known:*

6. Federal Department/Agency:

7. Federal Program Name/Description:

CFDA Number, *if applicable:* ____________

8. Federal Action Number, *if known:*

9. Award Amount, *if known:*
$

10. a. Name and Address of Lobbying Entity
(if individual, last name, first name, MI):

b. Individuals Performing Services *(including address if different from No. 10a)*
(last name, first name, MI):

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

11. Amount of Payment *(check all that apply):*
$ ______________ ☐ actual ☐ planned

12. Form of Payment *(check all that apply):*
☐ a. cash
☐ b. in-kind; specify: nature ______________
value ______________

13. Type of Payment *(check all that apply):*
☐ a. retainer
☐ b. one-time fee
☐ c. commission
☐ d. contingent fee
☐ e. deferred
☐ f. other; specify: ______________

14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

15. Continuation Sheet(s) SF-LLL-A attached: ☐ Yes ☐ No

16. [illegible]

Signature: ______________
Print Name: ______________
Title: ______________
Telephone No.: ____________ **Date:** ____________

Federal Use Only: [illegible]

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Standard Form - LLL

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 mintues per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503

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DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET

Approved by OMB
0348-0046

Reporting Entity: ________________________________ Page _____ of _____

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PART 85-GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

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85.105 Definitions.
85.110 Coverage.
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APPENDIX A TO PART 85--CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS--PRIMARY COVERED TRANSACTIONS COVERED TRANSACTIONS

APPENDIX B TO PART 85--CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION--LOWER TIER COVERED TRANSACTIONS

APPENDIX C TO PART 85--CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

AUTHORITY: E.O. 12549; Sec. 5151-5160 of the Drug-Free Workplace

Act of 1988 (Pub. L. 100-690, Title V, Subtitle D 41 U.S.C. 701 et seq); 20 U.S.C. 3474, 1221e-3(a)(1).

SOURCE: 53 FR 19191 and 19204, May 26, 1988, unless otherwise noted.

CROSS REFERENCE: See also Office of Management and Budget notice published at 55 FR 21679, May 25, 1990.

Subpart A-General

§ 85.100 Purpose.

(a) Executive Order (E.O.) 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a governmentwide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Except as provided in §85.200, Debarment or Suspension, §85.201, Treatment of Title IV, HEA participation, and §85.215, Exception provision, debarment or suspension of a participant in a program by one agency shall have governmentwide effect.

(b) These regulations implement section 3 of Executive Order 12549 and the guidelines promulgated by the Office of Management and Budget under section 6 of the Executive Order by:

(1) Prescribing the programs and activities that are covered by the governmentwide system;

(2) Prescribing the governmentwide criteria and governmentwide minimum due process procedures that each agency shall use;

(3) Providing for the listing of debarred and suspended participants, participants declared ineligible (see definition of "ineligible" in §85.105(i)), and participants who have voluntarily excluded themselves from participation in covered transactions

(4) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion; and

(5) Offering such other guidance as necessary for the effective implementation and administration of the governmentwide system.

(c) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 53 FR 19191, May 26, 1988]

§ 85.105 Definitions.

(a) *Adequate evidence*. Information sufficient to support the reasonable belief that a particular act or omission has occurred.

(b) *Affiliate*. Persons are affiliates of each another if, directly or indirectly, either one controls or has the power to control the other, *or*, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

(c) *Agency*. Any executive department, military department or defense agency or other agency of the executive branch, excluding the independent regulatory agencies.

(d) *Civil judgment.* The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation, or otherwise creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801-12).

(e) *Conviction.* A judgment of conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere.

(f) *Debarment.* An action taken by a debarring official in accordance with these regulations tc exclude a person from participating in covered transactions. A person so excluded is "debarred."

(g) *Debarring official.* An official authorized to impose debarment. The debarring official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(h) *Indictment.* Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

(i) *Ineligible.* Excluded from participation in Federal nonprocurement programs pursuant to a determination of ineligibility under statutory, executive order, or regulatory authority, other than Executive Order 12549 and its agency implementing regulations; for example, excluded pursuant to the Davis-Bacon Act and its implementing regulations, the equal employment opportunity acts and executive orders, or the environmental protection acts and executive orders. A person is ineligible where the determination of ineligibility affects such person's eligibility to participate in more than one covered transaction.

(j) *Legal proceedings.* Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State of local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

(k) *Nonprocurement List.* The portion of the *List of Parties Excluded from Federal Procurement or Nonprocurement Programs* complied, maintained and distributed by the General Services Administration (GSA) containing the names and other information about persons who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(l) *Notice.* A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

(m) *Participant.* Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

(n) *Person.* Any individual, corporation, partnership, association, unit of government or legal entity, however organized, except: foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities

(o) *Preponderance of the evidence.* Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not

(p) *Principal.* Officer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence on or substantive control over a covered transaction are:

(1) Principal investigators

(2) [Reserved]

(q) *Proposal.* A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking to participate or to receive a benefit, directly or indirectly, in or under a covered transaction

(r) *Respondent.* A person against whom a debarment or suspension action has been initiated

(s) *State.* Any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers that instrumentality to be an agency of the State government

(t) *Suspending official.* An official authorized to impose suspension. The suspending official is either:

(1) The agency head, or

(2) An official designated by the agency head

(u) *Suspension.* An action taken by a suspending official in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue. A person so excluded is "suspended."

(v) *Voluntary exclusion or voluntarily excluded.* A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement

(w) *ED.* The U.S. Department of Education

(Authority: E.O. 12549, 20 U.S.C. 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 53 FR 19192, May 26, 1988]

§ 85.110 Coverage.

(a) These regulations apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of these regulations such transactions will be referred to as "covered transactions."

(1) *Covered transaction.* For purposes of these regulations, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(i) *Primary covered transaction.* Except as noted in paragraph (a)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person. Primary covered transactions also include those transactions specially designated by the U.S. Department of Housing and Urban Development in such agency's regulations governing debarment and suspension.

(ii) *Lower tier covered transaction.* A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction.

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently $25,000) under a primary covered transaction.

(C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons are:

(*1*) Principal investigators.

(*2*) Providers of federally-required audit services.

(2) *Exceptions.* The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities;

(iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(iv) Federal employment;

(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and

(vii) Other transactions where the application of these regulations would be prohibited by law.

(b) *Relationship to other sections.* This section describes the types of transactions to which a debarment or suspension under the regulations will apply. Subpart B, "Effect of Action," §85.200, "Debarment or suspension," sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants and principals in the covered transactions and activities described in §85.110(a). Sections 85.325, "Scope of debarment," and 85.420, "Scope of suspension," govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal procurement activities.* Debarment and suspension of Federal procurement contractors and subcontractors under Federal procurement contracts are covered by the Federal Acquisition Regulation (FAR), 48 CFR Subpart 9.4.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. Agencies may impose debarment or suspension for the causes and in accordance with the procedures set forth in these regulations.

(c) When more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

(Authority: E.O. 12549; 20 U.S.C. 3474)

Subpart B-Effect of Action

§ 85.200 Debarment or suspension.

(a) *Primary covered transactions.* Except to the extent prohibited by law and subject to §85.201, Treatment of Title IV, HEA participation, persons who are debarred or suspended shall be excluded from primary covered transactions as either participants or principals throughout the executive branch of the Federal Government for the period of their debarment or suspension. Accordingly, ED shall not enter into primary covered transactions with such debarred or suspended persons during such period, except as permitted pursuant to §85.215.

(b) *Lower tier covered transactions.* Except to the extent prohibited by law and subject to §85.210, Treatment of Title IV, HEA participation, persons who have been debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transaction (see §85.110(a)(1)(ii)) for the period of their debarment or suspension. Such persons shall also be excluded from all contracts to provide federally-required audit services regardless of contract amount.

(c) *Exceptions.* Debarment or suspension does not affect a person's eligibility for:

(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(4) Federal employment;

(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(6) Incidental benefits derived from ordinary governmental operations; and

(7) Other transactions where the application of these regulations would be prohibited by law.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 53 FR 19192, May 26, 1988]

§ 85.201 Treatment of Title IV, HEA participation.

(a)(1) The debarment of an educational institution under E.O. 12549 pursuant to procedures that comply with 5 U.S.C. 554-557 (formal adjudication requirements under the Administrative Procedures Act) terminates the institution's eligibility to participate in any student financial assistance program authorized by Title IV of the Higher Education Act of 1965, as amended, for the duration of the debarment.

(2)(i) The suspension of an educational institution under E.O. 12549 pursuant to procedures that comply with 5 U.S.C. 554-557 suspends the institution's eligibility to participate in any student financial assistance program authorized by Title IV of the Higher Education Act of 1965, as amended.

(ii) The suspension of Title IV eligibility lasts for a period of 60 days, beginning on the date of the suspending official's decision, except that it may last longer if the institution and the Secretary agree to an extension or if the Secretary initiates a limitation or termination proceeding against the institution under 34 CFR part 668, Subpart G, prior to the 60th day.

(b)(1) Except as provided in paragraph (a) of this section, the debarment, suspension, proposed debarment, or proposed suspension of an educational institution or lender under E.O. 12549 does not affect the eligibility of the institution or lender to participate in any student financial assistance program authorized by Title IV of the Higher Education Act of 1965, as amended.

(2)(i) The Secretary initiates a debarment or suspension proceeding under §85.316 or §85.414, respectively, against an educational institution that is suspended or debarred under E.O. 12549 by ED or another Federal agency if the procedures used did not comply with 5 U.S.C. 554.557.

(ii) The Secretary conducts an audit or program review of any lender that is debarred or suspended by ED or another Federal agency, to determine whether grounds exist for the initiation of a fine, limitation, suspension, or termination action against the lender under 34 CFR part 668, Subpart G.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19192, May 26, 1988]

§ 85.205 Ineligible persons.

Persons who are ineligible, as defined in §85.105(i), are excluded in accordance with the applicable statutory, executive order, or regulatory authority.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.210 Voluntary exclusion.

Persons who accept voluntary exclusions under §85.315 are excluded in accordance with the terms of their settlements. ED shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.215 Exception provision.

ED may grant an exception permitting a debarred, suspended, or voluntarily excluded person to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549 and §85.200 of this rule. However, in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with §85.505(a).

(Authority: E.O. 12549, 20 U.S.C. 3474)

§ 85.220 Continuation of covered transactions.

(a) Notwithstanding the debarment, suspension, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(b) Except as provided in §85.201, Treatment of Title IV, HEA participation, and §85.215, Exception provision, the Secretary shall not, and participants shall not, renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, ineligible or voluntary excluded.

(Authority: E.O. 12549, 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 53 FR 19192, May 26, 1988]

§ 85.225 Failure to adhere to restrictions.

Except as permitted under §85.215 or §85.220 of these regulations, a participant shall not knowingly do business under a covered transaction with a person who is debarred or suspended, or with a person who is ineligible for or voluntarily excluded from that covered transaction. Violation of this restriction may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies, as appropriate. A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction (see Appendix B), unless it knows that the certification is erroneous. An agency has the burden of proof that such participant did knowingly do business with such a person.

(Authority: E.O. 12549, 20 U.S.C. 3474)

Subpart C-Debarment

§ 85.300 General.

The debarring official may debar a person for any of the causes in §85.305, using procedures established in §§85.310 through 85.314. The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

(Authority: E.O. 12549, 20 U.S.C. 3474)

§ 85.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§85.300 through 85.314 for:

(a) Conviction of or civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, the effective date of these regulations, or a procurement debarment by any Federal agency taken pursuant to 48 CFR Subpart 9.4;

(2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in §85.215 or §85.220;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under §85.315 or of any settlement of a debarment or suspension action.

(5) Violation of any requirement of Subpart F of this part, relating to providing a drug-free workplace, as set forth in §85.615 of this part.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

(Authority: E.O. 12549, 20 U.S.C. 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 54 FR 4950 and 4960, Jan. 31, 1989 and 55 FR 21699, May 25, 1990]

§ 85.310 Procedures.

ED shall process debarment actions as informally as practicable, consistent with the principles of fundamental fairness, using the procedures in §§85.311 through 85.314.

(Authority: E.O. 12549, 20 U.S.C. 3474)

§ 85.311 Investigation and referral.

Information concerning the existence of a cause for debarment from any source shall be promptly reported, investigated, and referred, when appropriate, to the debarring official for consideration. After consideration, the debarring official may issue a notice of proposed debarment.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.312 Notice of proposed debarment.

A debarment proceeding shall be initiated by notice to the respondent advising:

(a) That debarment is being considered;

(b) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(c) Of the cause(s) relied upon under §85.305 for proposing debarment;

(d) Of the provisions of §85.311 through §85.314, and any other ED procedures, if applicable, governing debarment decisionmaking; and

(e) Of the potential effect of a debarment.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.313 Opportunity to contest proposed debarment.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(b) *Additional proceedings as to disputed material facts.* (1) In actions not based upon a conviction or civil judgment, if the debarring official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents.

(2) A transcribed record of any additional proceedings shall be made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

(Authority: E.O. 12549, 20 U.S.C. 3474)

§ 85.314 Debarring official's decision.

(a) *No additional proceedings necessary.* In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(3) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(c) (1) *Standard of proof.* In any debarment action, the cause for debarment must be established by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(2) *Burden of proof.* The burden of proof is on the agency proposing debarment.

(d) *Notice of debarring official's decision.* (1) If the debarring official decides to impose debarment, the respondent shall be given prompt notice:

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or an authorized designee makes the determination referred to in §85.215 or the debarment or suspension is against-

(A) An educational institution under procedures that do not meet the requirements of §85.201(a); or

(B) A lender participating in the Title IV, Part B, HEA program.

(2) If the debarring official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 53 FR 19192, May 26, 1988]

§ 85.315 Settlement and voluntary exclusion.

(a) When in the best interest of the Government, ED may, at any time, settle a debarment or suspension action.

(b) If a participant and the agency agree to a voluntary exclusion of the participant, such voluntary exclusion shall be entered on the Nonprocurement List (see Subpart E).

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.316 Procedures for Title IV, HEA debarments.

(a)(1) If the Secretary debars an educational institution under E.O. 12549, the Secretary uses the following procedures in connection with the debarment to ensure that the debarment also precludes participation under Title IV of the Higher Education Act of 1965, as amended:

(i) The procedures in §85.312, Notice of proposed debarment, and §85.314(d), Notice of debarring official's decision.

(ii) Instead of the procedures in §85.313 and §85.314(a)-(c), the procedures in 34 CFR part 668, Subpart G.

(2) An administrative law judge shall act as the debarring official for proceeding under this section.

(b) On appeal from a decision debarring an educational institution, the Secretary issues a final decision after all parties have filed their written materials with the Secretary.

(c) In such a proceeding, in addition to the findings and conclusions required by 34 CFR part 668, Subpart G, the debarring official, and, on appeal, the Secretary, determine whether there exist sufficient grounds for debarment as set forth in §85.305.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19192, May 26, 1988]

§ 85.320 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(1) Debarment for causes other than those related to a violation of the requirements of Subpart F of this part generally should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed.

(2) In the case of a debarment for a violation of the requirements of Subpart F of this part (*see* §85.305(c)(5)), the period of debarment shall not exceed five years.

(b) The debarring official may extend an existing debarment for an additional period, if that official determines that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of §§85.311 through 85.314 shall be followed to extend the debarment.

(c) The respondent may request the debarring official to reverse the debarment decision or to reduce the period or scope of debarment. Such a request shall be in writing and supported by documentation. The debarring official may grant such a request for reasons including, but not limited to:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed, or

(5) Other reasons the debarring official deems appropriate.

(Authority: E.O. 12549; 20 U.S.C. 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 54 FR 4950 and 4960, Jan. 31, 1989 and 55 FR 21699, May 25, 1990]

§ 85.325 Scope of debarment.

(a) *Scope in general.* (1) Debarment of a person under these regulations constitutes debarment of all its divisions and other organizational elements from all covered transactions, unless the debarment decision is limited by its terms to one or more specifically identified individuals, divisions or other organizational elements or to specific types of transactions.

(2) The debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond (see §§85.311 through 85.314).

(b) *Imputing conduct.* For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) *Conduct imputed to participant.* The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner,

employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(3) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(Authority: E.O. 12549, 20 U.S.C. 3474)

Subpart D-Suspension

§ 85.400 General.

(a) The suspending official may suspend a person for any of the causes in §85.405 using procedures established in §§85.410 through 85.413.

(b) Suspension is a serious action to be imposed only when:

(1) There exists adequate evidence of one or more of the causes set out in §85.405, and

(2) Immediate action is necessary to protect the public interest.

(c) In assessing the adequacy of the evidence, the agency should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as grants, cooperative agreements, loan authorizations, and contracts.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§85.400 through 85.413 upon adequate evidence:

(1) To suspect the commission of an offense listed in §85.305(a); or

(2) That a cause for debarment under §85.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.410 Procedures.

(a) *Investigation and referral.* Information concerning the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred, when appropriate, to the suspending official for consideration. After consideration, the suspending official may issue a notice of suspension.

(b) *Decisionmaking process.* ED shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness, using the procedures in §§85.411 through 85.413.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.411 Notice of suspension.

When a respondent is suspended, notice shall immediately be given:

(a) That suspension has been imposed;

(b) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(c) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) relied upon under §85.405 for imposing suspension;

(e) That the suspension is for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings;

(f) Of the provisions of §§85.411 through 85.413 and any other ED procedures, if applicable, governing suspension decisionmaking; and

(g) Of the effect of the suspension.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.412 Opportunity to contest suspension.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(b) *Additional proceedings as to disputed material facts.* (1) If the suspending official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents, unless:

(i) The action is based on an indictment, conviction or civil judgment, or

(ii) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(2) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.413 Suspending official's decision.

The suspending official may modify or terminate the suspension (for example, see §85.320(c) for reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(a) *No additional proceedings necessary.* In actions: based on an indictment, conviction, or civil judgment; in which there is no genuine dispute over material facts; or in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary or capricious or clearly erroneous.

(c) *Notice of suspending official's decision.* Prompt written notice of the suspending official's decision shall be sent to the respondent.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.414 Procedures for Title IV, HEA suspensions under E.O. 12549.

(a) *Title IV E.O. 12549 suspensions.* (1) If the Secretary suspends an educational institution under E.O. 12549, the Secretary uses the following procedures in connection with the suspension to ensure that the suspension also precludes participation under Title IV of the Higher Education Act of 1965, as amended:

(i) The procedures in §85.411, Notice of suspension.

(ii) Instead of the procedures in §§85.412, 85.413, and 85.415, the procedures in 34 CFR part 668, Subpart G.

(2) An administrative law judge shall act as the suspending official for proceeding under this section.

(3) In such a proceeding, in addition to the findings and conclusions required by 34 CFR part 668, Subpart G, the suspending official, and, on appeal, the Secretary, determine whether there exist sufficient grounds for suspension under E.O. 12549 as set forth in §85.405.

(b) *Continued assistance under Title IV, HEA.* The institution may continue its participation in the Title IV programs until the procedures described in paragraph (a) of this section, except for those relating to appeals to the Secretary, have been completed, unless the Secretary takes an emergency action under 34 CFR part 668, Subpart G.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19193, May 26, 1988]

§ 85.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General or United States Attorney requests its extension in writing, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.420 Scope of suspension.

The scope of a suspension is the same as the scope of a debarment (see §85.325), except that the procedures of §§85.410 through 85.413 shall be used in imposing a suspension.

(Authority: E.O. 12549; 20 U.S.C. 3474)

Subpart E-Responsibilities of GSA, ED and Participants

§ 85.500 GSA responsibilities.

(a) In accordance with the OMB guidelines, GSA shall compile, maintain, and distribute a list of all persons who have been debarred, suspended, or voluntarily excluded by agencies under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(b) At a minimum, this list shall indicate:

(1) The names and addresses of all debarred, suspended, ineligible, and voluntarily excluded persons, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the agency point of contact for the action.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.505 ED responsibilities.

(a) The agency shall provide GSA with current information concerning debarments, suspension, determinations of ineligibility, and voluntary exclusions it has taken. Until February 18, 1989, the agency shall also provide GSA and OMB with information concerning all transactions in which ED has granted exceptions under §85.215 permitting participation by debarred, suspended, or voluntarily excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, the agency shall advise GSA of the information set forth in §85.500(b) and of the exceptions granted under §85.215 within five working days after taking such actions.

(c) The agency shall direct inquiries concerning listed persons to the agency that took the action.

(d) ED officials shall check the Nonprocurement List before entering covered transactions to determine whether a participant in a primary transaction is debarred, suspended, ineligible, or voluntarily excluded (Tel. #).

(e) ED officials shall check the Nonprocurement List before approving principals or lower tier participants where agency approval of the principal or lower tier participant is required under the terms of the transaction, to determine whether such principals or participants are debarred, suspended, ineligible, or voluntarily excluded.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.510 Participants' responsibilities.

(a) *Certification by participants in primary covered transactions.* Each participant shall submit the certification in Appendix A to this part for it and its principals at the time the participant submits its proposal in connection with a primary covered transaction, except that States need only complete such certification as to their principals. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, each participant may, but is not required to, check the Nonprocurement List for its principals (Tel. #). Adverse information on the certification will not necessarily result in denial of participation. However, the certification, and any additional information pertaining to the certification submitted by the participant, shall be considered in the administration of covered transactions.

(b) *Certification by participants in lower tier covered transactions.* (1) Each participant shall require participants in lower tier covered transactions to include the certification in Appendix B to this part for it and its principals in any proposal submitted in connection with such lower tier covered transactions.

(2) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction by any Federal agency, unless it knows that the certification is erroneous. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, a participant may, but is not required to, check the Nonprocurement List for its principals and for participants (Tel. #).

(c) *Changed circumstances regarding certification.* A participant shall provide immediate written notice to ED if at any time the participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. Participants in lower tier covered transactions shall provide the same updated notice to the participant to which it submitted its proposals.

(Authority: E.O. 12549; 20 U.S.C. 3474)

Subpart F-Drug-Free Workplace Requirements (Grants)

Source: 55 FR 21688, 21699, May 25, 1990, unless otherwise noted.

§ 85.600 Purpose.

(a) The purpose of this subpart is to carry out the Drug-Free Workplace Act of 1988 by requiring that-

(1) A grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the agency that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the agency are found at 48 CFR subparts 9.4, 23.5, and 52.2.

§ 85.605 Definitions.

(a) Except as amended in this section, the definitions of §85.105 apply to this subpart.

(b) For purposes of this subpart-

(1) *Controlled substance* means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15;

(2) *Conviction* means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(3) *Criminal drug statute* means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing,

use, or possession of any controlled substance;

(4) *Drug-free workplace* means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance;

(5) *Employee* means the employee of a grantee directly engaged in the performance of work under the grant, including:

(i) All *direct charge* employees;

(ii) All *indirect charge* employees, unless their impact or involvement is insignificant to the performance of the grant; and,

(iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll.

This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces);

(6) *Federal agency* or *agency* means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency;

(7) *Grant* means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to a grantee. The term grant includes block grant and entitlement grant programs, whether or not exempted from coverage under the grants management government-wide common rule on uniform administrative requirements for grants and cooperative agreements. The term does not include technical assistance that provides services instead of money, or other assistance in the form of loans, loan guarantees, interest subsidies, insurance, or direct appropriations; or any veterans' benefits to individuals, i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States;

(8) *Grantee* means a person who applies for or receives a grant directly from a Federal agency (except another Federal agency);

(9) *Individual* means a natural person;

(10) *State* means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers the instrumentality to be an agency of the State government.

§ 85.610 Coverage.

(a) This subpart applies to any grantee of the agency.

(b) This subpart applies to any grant, except where application of this subpart would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government. A determination of such inconsistency may be made only by the agency head or his/her designee.

(c) The provisions of subparts A, B, C, D and E of this part apply to matters covered by this subpart, except where specifically modified by this subpart. In the event of any conflict between provisions of this subpart and other provisions of this part, the provisions of this subpart are deemed to control with respect to the implementation of drug-free workplace requirements concerning grants.

§ 85.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.

A grantee shall be deemed in violation of the requirements of this subpart if the agency head or his or her official designee determines, in writing, that-

(a) The grantee has made a false certification under §85.630;

(b) With respect to a grantee other than an individual-

(1) The grantee has violated the certification by failing to carry out the requirements of paragraphs (A)(a)-(g) and/or (B) of the certification (Alternate I to Appendix C) or

(2) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.

(c) With respect to a grantee who is an individual-

(1) The grantee has violated the certification by failing to carry out its requirements (Alternate II to Appendix C), or

(2) The grantee is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity.

§ 85.620 Effect of violation.

(a) In the event of a violation of this subpart as provided in §85.615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:

(1) Suspension of payments under the grant;

(2) Suspension or termination of the grant; and

(3) Suspension or debarment of the grantee under the provisions of this part.

(b) Upon issuance of any final decision under this part requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years (*see* §85.320(a)(2) of this part).

§ 85.625 Exception provision.

The agency head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the agency head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

§ 85.630 Certification requirements and procedures.

(a)(1) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to the Federal agency providing the grant, as provided in Appendix C to this part.

(2) Grantees are not required to make a certification in order to continue receiving funds under a grant awarded before March 18, 1989, or under a no-cost time extension of such a grant. However, the grantee shall make a one-time drug-free workplace certification for a non-automatic continuation of such a grant made on or after March 18, 1989.

(b) Except as provided in this section, all grantees shall make the required certification for each grant. For mandatory formula grants and entitlements that have no application process, grantees shall submit a one-time certification in order to continue receiving awards.

(c) A grantee that is a State may elect to make one certification in each Federal fiscal year. States that previously submitted an annual certification are not required to make a certification for Fiscal Year 1990 until July 31, 1990. Except as provided in paragraph (d) of this section, this certification shall cover all grants to all State agencies from any Federal agency. The State shall retain the original of this statewide certification in its Governor's office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency has designated a central location for submission.

(1) If a State elects to make one certification in each Federal fiscal year as specified in paragraph (c) of this section it must forward its certification to: Office of Intergovernmental and Interagency Affairs.

(d)(1) The Governor of a State may exclude certain State agencies from the statewide certification and authorize these agencies to submit their own certifications to Federal agencies. The statewide certification shall name any State agencies so excluded.

(2) A State agency to which the statewide certification does not apply, or a State agency in a State that does not have a statewide certification, may elect to make one certification in each Federal fiscal year. State agencies that previously submitted a State agency certification are not required to make a certification for Fiscal Year 1990 until July 31, 1990. The State agency shall retain the original of this State agency-wide certification in its central office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency designates a central location for submission.

(i) If a State agency elects to make one certification in each Federal fiscal year as specified in paragraph (d) of this section it must forward its certification to: Office of Intergovernmental and Interagency Affairs.

(3) When the work of a grant is done by more than one State agency, the certification of the State agency directly receiving the grant shall be deemed to certify compliance for all workplaces, including those located in other State agencies.

(e)(1) For a grant of less than 30 days performance duration, grantees shall have this policy statement and program in place as soon as possible, but in any case by a date prior to the date on which performance is expected to be completed.

(2) For a grant of 30 days or more performance duration, grantees shall have this policy statement and program in place within 30 days after award.

(3) Where extraordinary circumstances warrant for a specific grant, the grant officer may determine a different date on which the policy statement and program shall be in place.

[55 FR 21688, 21699, May 25, 1990, as amended at 55 FR 21699, May 25, 1990]

§ 85.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

(a) When a grantee other than an individual is notified that an employee has been convicted for a violation of a criminal drug statute occurring in the workplace, it shall take the following actions:

(1) Within 10 calendar days of receiving notice of the conviction, the grantee shall provide written notice, including the convicted employee's position title, to every grant officer, or other designee on whose grant activity the convicted employee was working, unless a Federal

agency has designated a central point for the receipt of such notifications. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(i) A grantee must report convictions as specified in paragraph (a)(1) of this section to the Director, Grants and Contracts Service, Office of Management.

(2) Within 30 calendar days of receiving notice of the conviction, the grantee shall do the following with respect to the employee who was convicted.

(i) Take appropriate personnel action against the employee, up to and including termination, consistent with requirements of the Rehabilitation Act of 1973, as amended; or

(ii) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(b) A grantee who is an individual who is convicted for a violation of a criminal drug statute occurring during the conduct of any grant activity shall report the conviction, in writing, within 10 calendar days, to his or her Federal agency grant officer, or other designee, unless the Federal agency has designated a central point for the receipt of such notices. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(1) A grantee must report convictions as specified in paragraph (b) of this section to the Director, Grants and Contracts Service, Office of Management.

(Approved by the Office of Management and Budget under control number 0991-0002)

[55 FR 21688, 21699, May 25, 1990, as amended at 55 FR 21699, May 25, 1990]

APPENDIX A TO PART 85-CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS-PRIMARY COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause of default.

4. The prospective primary participant shall provide immediate written notice to the department or agency to whom this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms *covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal,* and *voluntarily excluded,* as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List (Tel. #).

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters-Primary Covered Transactions

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State of local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

APPENDIX B TO PART 85-CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION-LOWER TIER COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms *covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal,* and *voluntarily excluded,* as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled ''Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction,'' without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List (Tel. #).

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

APPENDIX C TO PART 85-CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

Instructions for Certification

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees who are individuals, Alternate II applies.

5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.

6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local

unemployment office, performers in concert halls or radio studios).

7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

8. Definitions of terms in the Nonprocurement Suspension and Debarment common rule and Drug-Free Workplace common rule apply to this certification. Grantees' attention is called, in particular, to the following definitions from these rules:

Controlled substance means a controlled substance in Schedules I through V of the Controlled Substances Act (21 U.S.C. 812) and as further defined by regulation (21 CFR 1308.11 through 1308.15);

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

Employee means the employee of a grantee directly engaged in the performance of work under a grant, including: (i) All *direct charge* employees; (ii) All *indirect charge* employees unless their impact or involvement is insignificant to the performance of the grant; and, (iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll. This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the grantee's payroll; or employees of subrecipients or subcontractors in covered workplaces).

Certification Regarding Drug-Free Workplace Requirements

Alternate I. (Grantees Other Than Individuals)

A. The grantee certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an ongoing drug-free awareness program to inform employees about-

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will-

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the

workplace no later than five calendar days after such conviction;

(e) Notifying the agency in writing, within ten calendar days after receiving notice under paragraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 30 calendar days of receiving notice under paragraph (d)(2), with respect to any employee who is so convicted-

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

____
____
____

Check ☐ if there are workplaces on file that are not identified here.

Alternate II. (Grantees Who Are Individuals)

(a) The grantee certifies that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant;

(b) If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant.

[5 FR 21690, 21699, May 25, 1990]

PART 86-DRUG-FREE SCHOOLS AND CAMPUSES

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AUTHORITY: 20 U.S.C. 1145g, 3224a.

SOURCE: 55 FR 33581, Aug. 16, 1990, unless otherwise noted.

Subpart A-General

§ 86.1 What is the purpose of the Drug-Free Schools and Campuses Regulations?

The purpose of the Drug-Free Schools and Campuses Regulations is to implement section 22 of the Drug-Free Schools and Communities Act Amendments of 1989, which adds section 1213 to the Higher Education Act and section 5145 to the Drug-Free Schools and Communities Act. These amendments require that, as a condition of receiving funds or any other form of financial assistance under any Federal program, an institution of higher education (IHE), State educational agency (SEA), or local educational agency (LEA) must certify that it has adopted and implemented a drug prevention program as described in this part.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.2 What Federal programs are covered by this part?

The Federal programs covered by this part include-

(a) All programs administered by the Department of Education under which an IHE, SEA, or LEA may receive funds or any other form of Federal financial assistance; and

(b) All programs administered by any other Federal agency under which an IHE, SEA, or LEA may receive funds or any other form of Federal financial assistance.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.3 What actions shall an IHE, SEA, or LEA take to comply with the requirements of this part?

(a) An IHE, SEA, or LEA shall adopt and implement a drug prevention program as described in §86.100 for IHEs, and §§86.200 and 201. for SEAs and LEAs, to prevent the unlawful possession, use, or distribution of illicit drugs and alcohol by all students and employees on school premises or as part of any of its activities.

(b) An IHE, SEA, or LEA shall provide a written certification that it has adopted and implemented the drug prevention program described in §86.100 for IHEs, and §§86.200 and 201 for SEAs and LEAs.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.4 What are the procedures for submitting a drug prevention program certification?

(a) *IHE drug prevention program certification.* An IHE shall submit to the Secretary the drug prevention program certification required by §86.3(b).

(b) *SEA drug prevention program certification.* An SEA shall submit to the Secretary the drug prevention program certification required by §86.3(b).

(c) *LEA drug prevention program certification.*

(1) The SEA shall develop a drug prevention program certification form and a schedule for submission of the certification by each LEA within its jurisdiction.

(2) An LEA shall submit to the SEA the drug prevention program certification required by §86.3(b).

(3)(i) The SEA shall provide to the Secretary a list of LEAs that have not submitted drug prevention program certifications and certify that all other LEAs in the State have submitted drug prevention program certifications to the SEA.

(ii) The SEA shall submit updates to the Secretary so that the list of LEAs described in paragraph (c)(3)(i) of this section is accurate at all times.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.5 What are the consequences if an IHE, SEA, or LEA fails to submit a drug prevention program certification?

(a) An IHE, SEA, or LEA that fails to submit a drug prevention program certification is not eligible to receive funds or any other form of financial assistance under any Federal program.

(b) The effect of loss of eligibility to receive funds or any other form of Federal financial assistance is determined by the statute and regulations governing the Federal programs under which an IHE, SEA, or LEA receives or desires to receive assistance.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.6 When must an IHE, SEA, or LEA submit a drug prevention program certification?

(a) After October 1, 1990, except as provided in paragraph (b) of this section, an IHE, SEA, or LEA is not eligible to receive funds or any other form of financial assistance under any Federal program until the IHE, SEA, or LEA has submitted a drug prevention program certification.

(b)(1) The Secretary may allow an IHE, SEA, or LEA until not later than April 1, 1991, to submit the drug prevention program certification, only if the IHE, SEA, or LEA establishes that it has a need, other than administrative convenience, for more time to adopt and implement its drug prevention program.

(2) An IHE, SEA, or LEA that wants to receive an extension of time to submit its drug prevention program certification shall submit a written justification to the Secretary that-

(i) Describes each part of its drug prevention program, whether in effect or planned;

(ii) Provides a schedule to complete and implement its drug prevention program; and

(iii) Explains why it has a need, other than administrative convenience, for more time to adopt and implement its drug prevention program.

(3)(i) An IHE or SEA shall submit a request for an extension to the Secretary.

(ii)(A) An LEA shall submit any request for an extension to the SEA.

(B) The SEA shall transmit any such request for an extension to the Secretary.

(C) The SEA may include with the LEA's request a recommendation as to whether the Secretary should approve it.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.7 What definitions apply to this part?

(a) *Definitions in the Drug-Free Schools and Communities Act.* The following terms used in this part are defined in the Act:
Drug abuse education and prevention
Illicit drug use

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR part 77:
Department
EDGAR
Local educational agency
Secretary
State educational agency.

(c) *Other definitions.* The following terms used in this part are defined as follows:

Compliance agreement means an agreement between the Secretary and an IHE, SEA, or LEA that is not in full compliance with its drug prevention program certification. The agreement specifies the steps the IHE, SEA, or LEA will take to comply fully with its drug prevention program certification, and provides a schedule for the accomplishment of those steps. A compliance agreement does not excuse or remedy past violations of this part.

Institution of higher education means-

(1) An institution of higher education, as defined in 34 CFR part 600.4;

(2) A proprietary institution of higher education, as defined in 34 CFR part 600.5;

(3) A postsecondary vocational institution, as defined in 34 CFR part 600.6; and

(4) A vocational school, as defined in 34 CFR part 600.7.

(Authority: 20 U.S.C. 1145g, 3224a)

Subpart B-Institutions of Higher Education

§ 86.100 What must the IHE's drug prevention program include?

The IHE's drug prevention program must, at a minimum, include the following:

(a) The annual distribution in writing to each employee, and to each student who is taking one or more classes for any type of academic credit except for continuing education units, regardless of the length of the student's program of study, of-

(1) Standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities;

(2) A description of the applicable legal sanctions under local, State, or Federal law for the unlawful possession or distribution of illicit drugs and alcohol;

(3) A description of the health risks associated with the use of illicit drugs and the abuse of alcohol;

(4) A description of any drug or alcohol counseling, treatment, or rehabilitation or re-entry programs that are available to employees or students; and

(5) A clear statement that the IHE will impose disciplinary sanctions on students and employees (consistent with local, State, and Federal law), and a description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violations of the standards of conduct required by paragraph (a)(1) of this section. For the purpose of this section, a disciplinary sanction may include the completion of an appropriate rehabilitation program.

(b) A biennial review by the IHE of its program to-

(1) Determine its effectiveness and implement changes to the program if they are needed; and

(2) Ensure that the disciplinary sanctions described in paragraph (a)(5) of this section are consistently enforced.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 1145g)

§ 86.101 What review of IHE drug prevention programs does the Secretary conduct?

The Secretary annually reviews a representative sample of IHE drug prevention programs.

(Authority: 20 U.S.C. 1145g)

§ 86.102 What is required of an IHE that the Secretary selects for annual review?

If the Secretary selects an IHE for review under §86.101, the IHE shall provide the Secretary access to personnel, records, documents and any other necessary information requested by the Secretary to review the IHE's adoption and implementation of its drug prevention program.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 1145g)

§ 86.103 What records and information must an IHE make available to the Secretary and the public concerning its drug prevention program?

(a) Each IHE that provides the drug prevention program certification required by §86.3(b) shall, upon request, make available to the Secretary and the public a copy of each item required by §86.100(a) as well as the results of the biennial review required by §86.100(b).

(b)(1) An IHE shall retain the following records for three years after the fiscal year in which the record was created:

(i) The items described in paragraph (a) of this section.

(ii) Any other records reasonably related to the IHE's compliance with the drug prevention program certification.

(2) If any litigation, claim, negotiation, audit, review, or other action involving the records has been started before expiration of the three-year period, the IHE shall retain the records until completion of the action and resolution of all issues that arise

from it, or until the end of the regular three-year period, whichever is later.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 1145g)

Subpart C-State and Local Educational Agencies

§ 86.200 What must the SEA's and LEA's drug prevention program for students include?

The SEA's and LEA's program for all students must, at a minimum, include the following:

(a) Age-appropriate, developmentally based drug and alcohol education and prevention programs (which address the legal, social, and health consequences of drug and alcohol use and which provide information about effective techniques for resisting peer pressure to use illicit drugs or alcohol) for all students in all grades of the schools operated or served by the SEA or LEA, from early childhood level through grade 12.

(b) A statement to students that the use of illicit drugs and the unlawful possession and use of alcohol is wrong and harmful.

(c) Standards of conduct that are applicable to students in all the SEA's and LEA's schools and that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students on school premises or as part of any of its activities.

(d) A clear statement that disciplinary sanctions (consistent with local, State, and Federal law), up to and including expulsion and referral for prosecution, will be imposed on students who violate the standards of conduct required by paragraph (c) of this section and a description of those sanctions. For the purpose of this section, a disciplinary sanction may include the completion of an appropriate rehabilitation program.

(e) Information about any drug and alcohol counseling and rehabilitation and re-entry programs that are available to students.

(f) A requirement that all parents and students be given a copy of the standards of conduct required by paragraph (c) of this section and the statement of disciplinary sanctions described in paragraph (d) of this section.

(g) Notification to parents and students that compliance with the standards of conduct required by paragraph (c) of this section is mandatory.

(h) A biennial review by the SEA or LEA of its program to-

(1) Determine its effectiveness and implement changes to the program if they are needed; and

(2) Ensure that the disciplinary sanctions described in paragraph (d) of this section are consistently enforced.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 3224a)

§ 86.201 What must the SEA's and LEA's drug prevention program for employees include?

The SEA's and LEA's program for all employees must, at a minimum, include the following:

(a) Standards of conduct applicable to employees that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol on school premises or as part of any of its activities.

(b) A clear statement that disciplinary sanctions (consistent with local, State, and Federal law) up to and including termination of employment and referral for prosecution, will be imposed on employees who violate the standards of conduct required by paragraph (a) of this section and a description of those sanctions. For the purpose of this section, a disciplinary sanction may include the completion of an appropriate rehabilitation program.

(c) Information about any drug and alcohol counseling and rehabilitation and re-entry programs that are available to employees.

(d) A requirement that employees be given a copy of the standards of conduct required by paragraph (a) of this section and the statement of disciplinary sanctions described in paragraph (b) of this section.

(e) Notification to employees that compliance with the standards of conduct required by paragraph (a) of this section is mandatory.

(f) A biennial review by the SEA and LEA of its program to-

(1) Determine its effectiveness and implement changes to the program if they are needed, and

(2) Ensure that the disciplinary sanctions described in paragraph (b) of this section are consistently enforced.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 3224a)

§ 86.202 What review of SEA and LEA drug prevention programs is required under this subpart?

(a)(1) An SEA shall annually review a representative sample of LEA programs.

(2) If an SEA finds, as a result of its annual review, that an LEA has failed to implement its program or consistently enforce its disciplinary sanctions, the SEA shall submit that information, along with the findings of its review, to the Secretary within thirty (30) days after completion of the review.

(b) The Secretary may annually select a representative sample of SEA programs for review.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 3224a)

§ 86.203 What is required of an SEA or LEA that is selected for review?

(a) If the Secretary selects an SEA for review under §86.202(b), the SEA shall provide the Secretary access to personnel, records, documents, and any other information necessary to review the adoption and implementation of its drug prevention program.

(b) If the SEA selects an LEA for review under §86.202(a), the LEA shall provide the SEA access to personnel, records, documents, and any other information necessary to review the adoption and implementation of its drug prevention program.

(Authority: 20 U.S.C. 3224a)

§ 86.204 What records and information must an SEA or LEA make available to the Secretary and the public concerning its drug prevention program?

(a)(1) Each SEA that provides the drug prevention program certification shall, upon request, make available to the Secretary and the public full information about the elements of its drug prevention program, including the results of its biennial review required by §§86.200(h) and 86.201(f).

(2) The SEA that provides the drug prevention program certification shall provide the Secretary access to personnel, records, documents, and any other information related to the SEA's compliance with the certification.

(b)(1) Each LEA that provides the drug prevention program certification shall, upon request, make available to the Secretary, the SEA, and the public full information about the elements of its program, including the results of its biennial review required by §§86.200(h) and 86.201(f).

(2) The LEA that provides the drug prevention program certification shall provide the Secretary access to personnel, records, documents, and any other information related to the LEA's compliance with the certification.

(c)(1) Each SEA or LEA shall retain the following records for three years after the fiscal year in which the record was created.

(i) The items described in paragraphs (a) and (b) of this section.

(ii) Any other records related to the SEA's or LEA's compliance with the certification.

(2) If any litigation, claim, negotiation, audit, review, or other action involving the records has been started before expiration of the three-year period, the SEA or LEA shall retain the records until completion of the action and resolution of all issues that arise from it, or until the end of the regular three-year period, whichever is later.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 3224a)

Subpart D-Responses and Sanctions Issued or Imposed by the Secretary for Violations by an IHE, SEA, or LEA

§ 86.300 What constitutes a violation of this part by an IHE, SEA, or LEA?

An IHE, SEA, or LEA violates this part by-

(a) Receiving any form of Federal financial assistance after becoming ineligible to receive that assistance because of failure to submit a certification in accordance with §86.3(b); or

(b) Violating its certification. Violation of a certification includes failure of an IHE, SEA, or LEA to-

(1) Adopt or implement its drug prevention program; or

(2) Consistently enforce its disciplinary sanctions for violations by students and employees of the standards of conduct adopted by an IHE under §86.100(a)(1) or by an SEA or LEA under §§86.200(c) and 86.201(a).

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.301 What actions may the Secretary take if an IHE, SEA, or LEA violates this part?

(a) If an IHE, SEA, or LEA violates its certification, the Secretary may issue a response to the IHE, SEA, or LEA. A response may include, but is not limited to-

(1) Provision of information and technical assistance; and

(2) Formulation of a compliance agreement designed to bring the IHE, SEA, or LEA into full compliance with this part as soon as feasible.

(b) If an IHE, SEA, or LEA receives any form of Federal financial assistance without having submitted a certification or violates its certification, the Secretary may impose one or more sanctions on the IHE, SEA, or LEA, including-

(1) Repayment of any or all forms of Federal financial assistance received by the IHE, SEA, or LEA when it was in violation of this part, and

(2) The termination of any or all forms of Federal financial assistance that-

(i)(A) Except as specified in paragraph (b)(2)(ii) of this section, ends an IHE's, SEA's, or LEA's eligibility to receive any or all forms of Federal financial assistance. The Secretary specifies which forms of Federal financial assistance would be affected; and

(B) Prohibits an IHE, SEA, or LEA from making any new obligations against Federal funds; and

(ii) For purposes of an IHE's participation in the student financial assistance programs authorized by title IV of the Higher Education Act of 1965 as amended, has the same effect as a termination under 34 CFR 668.94.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.302 What are the procedures used by the Secretary for providing information or technical assistance?

(a) The Secretary provides information or technical assistance to an IHE, SEA, or LEA in writing, through site visits, or by other means.

(b) The IHE, SEA, or LEA shall inform the Secretary of any corrective action it has taken within a period specified by the Secretary.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.303 What are the procedures used by the Secretary for issuing a response other than the formulation of a compliance agreement or the provision of information or technical assistance?

(a) If the Secretary intends to issue a response other than the formulation of a compliance agreement or the provision of information or technical assistance, the Secretary notifies the IHE, SEA, or LEA in writing of-

(1) The Secretary's determination that there are grounds to issue a response other than the formulation of a compliance agreement or providing information or technical assistance, and

(2) The response the Secretary intends to issue.

(b) An IHE, SEA, or LEA may submit written comments to the Secretary on the determination under paragraph (a)(1) of this section and the intended response under paragraph (a)(2) of this section within 30 days after the date the IHE, SEA, or LEA receives the notification of the Secretary's intent to issue a response.

(c) Based on the initial notification and the written comments of the IHE, SEA, or LEA, the Secretary makes a final determination and, if appropriate, issues a final response.

(d) The IHE, SEA, or LEA shall inform the Secretary of the corrective action it has taken in order to comply with the terms of the Secretary's response within a period specified by the Secretary.

(e) If an IHE, SEA, or LEA does not comply with the terms of a response issued by the Secretary, the Secretary may issue an additional response or impose a sanction on the IHE, SEA, or LEA in accordance with the procedures in §86.304.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.304 What are the procedures used by the Secretary to demand repayment of Federal financial assistance or terminate an IHE's, SEA's, or LEA's eligibility for any or all forms of Federal financial assistance?

(a) A designated Department official begins a proceeding for repayment of Federal financial assistance or termination, or both, of an IHE's, SEA's, or LEA's eligibility for any or all forms of Federal financial assistance by sending the IHE, SEA, or LEA a notice by certified mail with return receipt requested. This notice-

(1) Informs the IHE, SEA, or LEA of the Secretary's intent to demand repayment of Federal financial assistance or to terminate, describes the consequences of that action, and identifies the alleged violations that constitute the basis for the action;

(2) Specifies, as appropriate-

(i) The amount of Federal financial assistance that must be repaid and the date by which the IHE, SEA, or LEA must repay the funds, and

(ii) The proposed effective date of the termination, which must be at least 30 days after the date of receipt of the notice of intent; and

(3) Informs the IHE, SEA, or LEA that the repayment of Federal financial assistance will not be required or that the termination will not be effective on the date specified in the notice if the designated Department official receives, within a 30-day period beginning on the date the IHE, SEA, or LEA receives the notice of intent described in this paragraph-

(i) Written material indicating why the repayment of Federal financial assistance or termination should not take place, or

(ii) A request for a hearing that contains a concise statement of disputed issues of law and fact, the IHE's, SEA's, or LEA's position with respect to these issues, and, if appropriate, a description of which Federal financial assistance the IHE, SEA, or LEA contends need not be repaid.

(b) If the IHE, SEA, or LEA does not request a hearing but submits written material-

(1) The IHE, SEA, or LEA receives no additional opportunity to request or receive a hearing, and

(2) The designated Department official, after considering the written material, notifies the IHE, SEA, or LEA in writing whether-

(i) Any or all of the Federal financial assistance must be repaid, or

(ii) The proposed termination is dismissed or imposed as of a specified date.

(Authority: 20 U.S.C. 1145g, 3224a)

Subpart E-Appeal Procedures

§ 86.400 What is the scope of this subpart?

(a) The procedures in this subpart are the exclusive procedures governing appeals of decisions by a designated Department official to demand the repayment of Federal financial assistance or terminate the eligibility of an IHE, SEA, or LEA to receive some or all forms of Federal financial assistance for violations of this part.

(b) An Administrative Law Judge (ALJ) hears appeals under this subpart.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.401 What are the authority and responsibility of the ALJ?

(a) The ALJ regulates the course of the proceeding and conduct of the parties during the hearing and takes all steps necessary to conduct a fair and impartial proceeding.

(b) The ALJ is not authorized to issue subpoenas.

(c) The ALJ takes whatever measures are appropriate to expedite the proceeding. These measures may include, but are not limited to-

(1) Scheduling of conferences;

(2) Setting time limits for hearings and submission of written documents; and

(3) Terminating the hearing and issuing a decision against a party if that party does not meet those time limits.

(d) The scope of the ALJ's review is limited to determining whether-

(1) The IHE, SEA, or LEA received any form of Federal financial assistance after becoming ineligible to receive that assistance because of failure to submit a certification; or

(2) The IHE, SEA, or LEA violated its certification.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.402 Who may be a party in a hearing under this subpart?

(a) Only the designated Department official and the IHE, SEA, or LEA that is the subject of the proposed termination or recovery of Federal financial assistance may be parties in a hearing under this subpart.

(b) Except as provided in this subpart, no person or organization other than a party may participate in a hearing under this subpart.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.403 May a party be represented by counsel?

A party may be represented by counsel.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.404 How may a party communicate with an ALJ?

(a) A party may not communicate with an ALJ on any fact at issue in the case or on any matter relevant to the merits of the case unless the other party is given notice and an opportunity to participate.

(b)(1) To obtain an order or ruling from an ALJ, a party shall make a motion to the ALJ.

(2) Except for a request for an extension of time, a motion must be made in writing unless the parties appear in person or participate in a conference telephone call. The ALJ may require a party to reduce an oral motion to writing.

(3) If a party files a written motion, the party shall do so in accordance with §86.405.

(4) Except for a request for an extension of time, the ALJ may not grant a party's written motion without the consent of the other party unless the other party has had at least 21 days from the date of service of the motion to respond. However, the ALJ may deny a motion without awaiting a response.

(5) The date of service of a motion is determined by the standards for determining a filing date in §86.405(d).

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.405 What are the requirements for filing written submissions?

(a) Any written submission under this subpart must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) If a party files a brief or other document, the party shall serve a copy of the filed material on the other party on the filing date by hand-delivery or by mail. If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(c) Any written submission must be accompanied by a statement certifying the date that the filed material was filed and served on the other party.

(d) (1) The filing date for a written submission is the date the document is-

(i) Hand-delivered,

(ii) Mailed, or

(iii) Sent by facsimile transmission.

(2) If a scheduled filing date falls on a Saturday, Sunday, or Federal holiday, the filing deadline is the next Federal business day.

(e) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(f) If a document is filed by facsimile transmission, the Secretary or the designated Department official, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(Authority: 20 U.S.C. 1145g, 3224a)

[57 FR 56795, Nov. 30, 1992]

§ 86.406 What must the ALJ do if the parties enter settlement negotiations?

(a) If the parties to a case file a joint motion requesting a stay of the proceedings for settlement negotiations or for the parties to obtain approval of a settlement agreement, the ALJ grants the stay.

(b) The following are not admissible in any proceeding under this part:

(1) Evidence of conduct during settlement negotiations.

(2) Statements made during settlement negotiations.

(3) Terms of settlement offers.

(c) The parties may not disclose the contents of settlement negotiations to the ALJ. If the parties enter into a settlement agreement and file a joint motion to dismiss the case, the ALJ grants the motion.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.407 What are the procedures for scheduling a hearing?

(a) If the IHE, SEA, or LEA requests a hearing by the time specified in §86.304(a)(3), the designated Department official sets the date and the place.

(b)(1) The date is at least 15 days after the designated Department official receives the request and no later than 45 days after the request for hearing is received by the Department.

(2) On the motion of either or both parties, the ALJ may extend the period before the hearing is scheduled beyond the 45 days specified in paragraph (b)(1) of this section.

(c) No termination takes effect until after a hearing is held and a decision is issued by the Department.

(d) With the approval of the ALJ and the consent of the designated Department official and the IHE, SEA, or LEA, any time schedule specified in this section may be shortened.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.408 What are the procedures for conducting a pre-hearing conference?

(a)(1) A pre-hearing conference may be convened by the ALJ if the ALJ thinks that such a conference would be useful, or if requested by-

(i) The designated Department official, or

(ii) The IHE, SEA, or LEA.

(2) The purpose of a pre-hearing conference is to allow the parties to settle, narrow, or clarify the dispute.

(b) A pre-hearing conference may consist of-

(1) A conference telephone call;

(2) An informal meeting; or

(3) The submission and exchange of written material.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.409 What are the procedures for conducting a hearing on the record?

(a) A hearing on the record is an orderly presentation of arguments and evidence conducted by an ALJ.

(b) An ALJ conducts the hearing entirely on the basis of briefs and other written submissions unless-

(1) The ALJ determines, after reviewing all appropriate submissions, that an evidentiary hearing is needed to resolve a material factual issue in dispute; or

(2) The ALJ determines, after reviewing all appropriate submissions, that oral argument is needed to clarify the issues in the case.

(c) The hearing process may be expedited as agreed by the ALJ, the designated Department official, and the IHE, SEA, or LEA. Procedures to expedite may include, but are not limited to, the following:

(1) A restriction on the number or length of submissions.

(2) The conduct of the hearing by telephone conference call.

(3) A review limited to the written record.

(4) A certification by the parties to facts and legal authorities not in dispute.

(d)(1) The formal rules of evidence and procedures applicable to proceedings in a court of law are not applicable.

(2) The designated Department official has the burden of persuasion in any proceeding under this subpart.

(3)(i) The parties may agree to exchange relevant documents and information.

(ii) The ALJ may not order discovery, as provided for under the Federal Rules of Civil Procedure, or any other exchange between the parties of documents or information.

(4) The ALJ accepts only evidence that is relevant and material to the proceeding and is not unduly repetitious.

(e) The ALJ makes a transcribed record of any evidentiary hearing or oral argument that is held, and makes the record available to-

(1) The designated Department official; and

(2) The IHE, SEA, or LEA on its request and upon payment of a fee comparable to that prescribed under the Department of Education Freedom of Information Act regulations (34 CFR part 5).

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.410 What are the procedures for issuance of a decision?

(a)(1) The ALJ issues a written decision to the IHE, SEA, or LEA, the designated Department official, and the Secretary by certified mail, return receipt requested, within 30 days after-

(i) The last brief is filed;

(ii) The last day of the hearing if one is held; or

(iii) The date on which the ALJ terminates the hearing in accordance with §86.401(c)(3).

(2) The ALJ's decision states whether the violation or violations contained in the Secretary's notification occurred, and

articulates the reasons for the ALJ's finding.

(3) The ALJ bases findings of fact only on evidence in the hearing record and on matters given judicial notice.

(b)(1) The ALJ's decision is the final decision of the agency. However, the Secretary reviews the decision on request of either party, and may review the decision on his or her own initiative.

(2) If the Secretary decides to review the decision on his or her own initiative, the Secretary informs the parties of his or her intention to review by written notice sent within 15 days of the Secretary's receipt of the ALJ's decision.

(c)(1) Either party may request review by the Secretary by submitting a brief or written materials to the Secretary within 20 days of the party's receipt of the ALJ's decision. The submission must explain why the decision of the ALJ should be modified, reversed, or remanded. The other party shall respond within 20 days of receipt of the brief or written materials filed by the opposing party.

(2) Neither party may introduce new evidence on review.

(d) The decision of the ALJ ordering the repayment of Federal financial assistance or terminating the eligibility of an IHE, SEA, or LEA does not take effect pending the Secretary's review.

(e)(1) The Secretary reviews the ALJ's decision considering only evidence introduced into the record.

(2) The Secretary's decision may affirm, modify, reverse or remand the ALJ's decision and includes a statement of reasons for the decision.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.411 What are the procedures for requesting reinstatement of eligibility?

(a)(1) An IHE, SEA, or LEA whose eligibility to receive any or all forms of Federal financial assistance has been terminated may file with the Department a request for reinstatement as an eligible entity no earlier than 18 months after the effective date of the termination.

(2) In order to be reinstated, the IHE, SEA, or LEA must demonstrate that it has corrected the violation or violations on which the termination was based, and that it has met any repayment obligation imposed upon it under §86.301(b)(1) of this part.

(b) In addition to the requirements of paragraph (a) of this section, the IHE, SEA, or LEA shall comply with the requirements and procedures for reinstatement of eligibility applicable to any Federal program under which it desires to receive Federal financial assistance.

(Authority: 20 U.S.C. 1145g, 3224a)

APPENDIX A

Vol. 59 No. 221 Thursday, November 17, 1994 p 59578 (Rule)

DEPARTMENT OF EDUCATION

34 CFR Parts 75 and 76

RIN 1880-AA50

Direct Grant Programs and State-Administered Programs

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the Department's regulations on direct grant programs and State-administered programs to clarify the requirements and procedures for establishing and applying indirect cost rates under programs administered by the Department.

EFFECTIVE DATE: These regulations take effect on December 19, 1994.

FOR FURTHER INFORMATION CONTACT: Glenn Riley, U.S. Department of Education, 400 Maryland Avenue, S.W., Room 3636, ROB-3, Washington, D.C. 20202-4700. Telephone: (202) 708-7640. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: On January 14, 1994, the Secretary published in the **Federal Register** (59 FR 2480) a notice of proposed rulemaking (NPRM) proposing to revise certain sections in the Education Department General Administrative Regulations (EDGAR) on indirect cost rates. These proposed revisions were intended to improve the administration of discretionary grants and to clarify for grantees the procedures and requirements of the Department.

The proposed regulations addressed a number of problems in this area of grants administration, including the computation and use of restricted indirect cost rates in programs with a statutory supplement-not-supplant requirement, the definition of a training grant, and the use of indirect costs as matching or cost-sharing.

Significant differences between the NPRM and this final regulation include changes to §§ 75.561 and 76.561 to allow State educational agencies to approve multi-year indirect cost rates for local educational agencies, the deletion of research training programs from the definition of a training grant in § 75.562, and the inclusion of a definition of "modified total direct cost base," also in § 75.562.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 21 parties submitted comments on the proposed regulations. An analysis of the comments and of the resulting changes in the regulations follows.

Substantive issues are discussed under the section of the regulations to which they pertain. Technical and other minor changes-and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority-are not addressed.

Section 75.560 General Indirect Cost Rates; Exceptions

Since the Department recently adopted the revised OMB Circular A-110 as 34 CFR Part 74, references in this section have been revised to be consistent with the new Part 74.

Comments: Several parties commented on the requirement that a recipient have a current indirect cost rate agreement to charge indirect costs to a grant, asking what should happen if a recipient has submitted an indirect cost proposal but has not received approval from the Department. One suggested that the Department should assign an indirect cost rate based on the applicant's last approved rate and another thought the applicant should be allowed to use its proposed rate.

Discussion: The Department now allows six months to review a rate proposal and negotiate a new rate, which is generally adequate time to complete the process. If for some reason a rate has not been approved on time, the use of a temporary rate would be considered by the Department. Since other changes to these regulations give the Department authority to establish temporary rates, no additional changes concerning temporary rates are necessary.

Changes: None.

Comments: Another commenter asked about the effect of the proposed regulations on contractors under a grant and whether this section requires contractors to obtain a rate, including a temporary rate if necessary, from the Department.

Discussion: Many contractors already have a negotiated indirect cost rate because they are direct recipients of Federal funds. Under current procedures State and local governments are expected to assign an indirect cost rate to a contractor or other lower tier organization that does not already have one. Thus State educational agencies assign rates to their local educational agencies (see § 75.561). These regulations do nothing to change these practices and contractors or other lower tier organizations are not expected to negotiate a rate with the Department.

Changes: None.

Section 75.561 Approval of indirect cost rates.

Comments: Several commenters were confused by the statement in § 75.561(c) that the Secretary approves indirect cost rate agreements, an apparent conflict with the practice of the cognizant agency negotiating a rate with an applicant.

Discussion: The Secretary does negotiate indirect cost rates with applicants, but only when the Department is the cognizant agency. A change has been made to clarify this paragraph.

Changes: Section 75.561(a) has been revised to make it clear that the Secretary approves indirect cost rates for applicants when the Department is the cognizant agency.

Comments: One commenter suggested that State educational agencies have the same flexibility to approve multi-year indirect cost rates as the proposed revision to § 75.561 would give the Secretary. The commenter observed that it would be more cost-effective, particularly for small local educational agencies, to have rates in effect for more than one year.

Discussion: The Secretary agrees with this comment and has made a change.

Changes: Section 75.561(b) has been revised to allow State educational agencies to approve indirect cost rates-for local educational agencies-that are in effect for more than one year.

Section 75.562 Indirect cost rates for educational training projects.

Comments: A commenter objected to the inclusion of research training programs in the proposed definition of an educational training grant, observing that OMB Circular A-21 specifies that research training is part of an institution's sponsored research activities.

Discussion: OMB Circular A-21, in Section B, Definition of Terms, states that the term "sponsored research" includes "activities involving the training of individuals in research techniques (commonly called research training) * * *." In order to be consistent with this circular, the Secretary has made a change in the definition of an educational training grant.

Changes: The phrase "including special research training programs" has been deleted from the definition of an educational training grant in § 75.562(a).

Comments: A few commenters thought that the definition of a training grant was ambiguous and too broad. One suggested that it be limited to grants that were designated as training grants by statute or where the grant includes such costs as tuition and fees (so-called "flow-through" funds) that are used by the recipient to cover a portion of its indirect costs. Another asked if the Secretary would be using this definition in determining which grants are training grants, as stated in § 75.562(b).

Discussion: The fact that the proposed definition of a training grant is broad and comprehensive is a reflection of the great variety of grants administered by the Department that are training grants. The definition suggested by the commenter would overly limit the designation of training grants and exclude certain programs that clearly are primarily for the provision of training. The intent of the definition is to provide the public with the criteria used by the Secretary in determining what is a training grant and a change has been made to make this clear.

Changes: Section 75.562(b) has been revised to indicate that the Secretary does use the definition of a training grant in paragraph (a) in determining which grants are educational training grants.

Comments: Several commenters objected to the Department's use of the eight percent limit on training grants and thought the rate negotiated by the recipient with its cognizant agency should be employed instead.

Discussion: Since its inception, the Department has consistently maintained the necessity of limiting the indirect cost rate on training grants. This policy was originally established when the Department was a component of the Department of Health, Education, and Welfare, now the Department of Health and Human Services (HHS). This policy is still in effect at HHS and is intended in part to maximize the number of projects funded under these programs. In addition, a number of training projects contain significant amounts of flow-through funds and therefore do not carry the same burden of overhead or administrative costs as do other projects. The Secretary does not agree that the recipients of training grants should be reimbursed at their full negotiated rates and no change in this section has been made.

Changes: None.

Comments: Nine comments were received on the proposed revision to § 75.562(c) that would require the training rate of eight percent to be applied to a modified total direct cost base, instead of using a base of total direct costs as in the current regulation. Commenters opposed this change on grounds that it would further reduce a grantee's ability to recover legitimate indirect costs under training grants and reduce the number of organizations that could afford to apply for those grants. Several commenters also asked for a definition of "modified total direct cost base."

Discussion: There is general agreement in the grants community that indirect costs should not be charged to activities that do not have significant administrative costs associated with them, such as "flow-through funds" (e.g., tuition, fees, and stipends). The Secretary proposed to revise these regulations to be consistent with this principle and to clarify for all interested parties what base should be used in computing indirect costs under a training grant. Though this change will reduce the indirect costs charged to the Department's grants for some recipients, the Secretary does not agree that the indirect cost base for training grants should include activities or costs that do not generate significant administrative expenses. However, the Secretary has made a change to clarify the term "modified total direct cost base."

Changes: Section 75.562(c) has been revised to include a definition of "modified total direct cost base." It has also been reworded to make it clearer that the paragraph is referring to the lesser amount of funds, not the lesser rate.

Comments: One commenter stated that the eight percent limitation should not apply to contractors under training grants, as required by § 75.562(c)(1), since not all contractors are in a position to absorb the costs not covered by the limited rate.

Discussion: If the contractor is not conducting training activities, the eight percent limitation would not apply and the contractor could use its negotiated rate. However, a contractor that is conducting training under a training grant would still be subject to the limitation of eight percent. No change has been made in this paragraph.

Changes: None.

Comments: Thirteen commenters objected to the requirement in § 75.562(c)(3) that indirect costs in excess of the eight percent limitation may not be used to satisfy cost-sharing or matching requirements. Many cited the new provision in OMB Circular A-110 that allows the use of unrecovered indirect costs for this purpose, with the approval of the granting agency. Commenters were concerned that this limitation would make it difficult for many competent applicants to qualify for grants that require cost-sharing or matching.

Discussion: The Department has a long-standing practice not to allow the use of unrecovered indirect costs under training grants as matching or cost-sharing. This practice was required because under a previous version of OMB Circular A-110 and the Department's implementing regulations in 34 CFR Part 74, only allowable costs could be used for matching or cost-sharing purposes. Since training grants are limited to an eight percent indirect cost rate, all indirect costs over that limit were considered unallowable and thus could not be used as matching or cost-sharing. The practice also had the result of maximizing the funds that support project activities, because the use of unrecovered indirect costs to meet matching or cost-sharing requirements would reduce the amount of direct cost funds being put into the project by the recipient.

The Department recently revised 34 CFR Part 74 to implement revisions to OMB Circular A-110. The circular and Part 74 now allow institutions of higher education, non-profit organizations, and hospitals that receive funds under Federal programs to use unrecovered indirect costs for matching or cost-sharing, but only with the approval of the awarding agency. In light of this change and in response to the concerns expressed by commenters, the Secretary re-examined this practice but decided not to change it because it maximizes the impact of the limited funds available for training grant programs.

Changes: None.

Comments: The Department received comments suggesting that applicants be notified as early as possible in the application process that a program is subject to the training rate or to the restricted rate based on a statutory supplement-not-supplant requirement. Commenters thought this information should be included in the application packages and also on the grant award notices.

Discussion: Many programs already include this information in application packages and notices, but, in an effort to assist applicants as much as possible, the Department will do this for the other programs as well. The issue is somewhat complicated by the fact that some, but not all, grants awarded under certain programs may be training grants. In this case the Department will include in the application package and notice a statement that some grants awarded under the program could be training grants subject to the eight percent limitation on indirect costs, depending upon the type of project proposed. The Department is already taking steps to include information in the Catalog of Federal Domestic Assistance that identifies those programs subject to the restricted rate based on the supplement-not-supplant requirement. As for placing the information on the award notices, the Department is currently redesigning its core financial systems, including the grants management system, and this information will be on award notices produced under the new system. These notification issues were not addressed in the proposed regulations and no change has been made to include them in the final regulations.

Changes: None.

Comments: A few commenters thought that the Department should exclude training grants and their indirect costs from the process used by the Department to establish indirect cost rates. This would have the effect of increasing the organization's negotiated rate and would offset somewhat the loss of indirect costs under the training grants.

Discussion: This issue was not included in the proposed regulations but will be considered by the Department during its periodic reviews of administrative procedures.

Changes: None.

Section 75.563 Restricted Indirect Cost Rate-Programs Covered

Comments: One commenter said that the restricted rates applicable to programs with the supplement-not-supplant requirement should not be applied to universities that have a negotiated indirect cost rate. They suggested that §§ 75.563 and 75.564(f) be deleted.

Discussion: The Department applies a restricted rate only to grants made under programs that have a statutory requirement that Federal funds be used to supplement, not supplant, institutional funds. If a recipient happens to be an institution of higher education, the restricted rate must be applied-the Department has no choice on the matter because the rate implements a statutory limitation. However, as a matter of practice, the recipients of grants under these programs are predominately State educational agencies or local educational agencies; very few institutions of higher education receive grants under restricted rate programs.

Changes: None.

Section 75.564 Reimbursement of Indirect Costs

Comments: Several commenters thought the language in § 75.564(a) was confusing and contradicts § 75.564(b) and § 75.560(d). They thought § 75.564(a) should be revised to make it clear that the Department accepts the rate negotiated with an applicant's cognizant agency.

Discussion: This section addresses the issue of reimbursement of indirect costs and the opening paragraph is a general statement of the Department's policies in this area. As stated in the first sentence, there are administrative and statutory restrictions that affect the reimbursement of indirect costs under programs administered by ED. There are also situations, though infrequent, when indirect costs are not reimbursed due to a lack of funds. This usually occurs when a grantee is seeking reimbursement of indirect costs because the applicable rate was adjusted upwards during or after the performance of the grant. The Secretary agrees that the second sentence in this section is somewhat confusing and has made a change.

Changes: The second sentence in § 75.564(a), "The extent to which indirect costs are reimbursed is a matter for determination between the Secretary and the grantee," has been deleted from the final regulation.

Comments: The Department received comments that construction grants and grants in support of conferences should not be included in the list of grants in § 75.564(c) for which indirect costs are unallowable. The commenters think these types of grants do carry considerable administrative costs and ED should reimburse recipients for their indirect costs. One commenter suggested that the language concerning conferences be revised to apply to grants made exclusively to support conferences.

Discussion: The Department does not agree that construction grants carry the same administrative costs as other types of grants. Most of the construction work funded by those grants is carried out under subcontracts, a practice which results in recipients incurring relatively little overhead expense in comparison to other types of grants. Also, unlike other products of grant-supported activities, the costs of a building can be recovered through depreciation or use allowances. Therefore no change has been made concerning construction grants, but the language on grants for conferences has been revised.

Changes: Section 75.564(c)(6) has been revised to apply to grants made exclusively to support conferences.

Comments: Several commenters thought § 75.564(e) prohibits the use of indirect costs to satisfy matching or cost-sharing requirements and so should be revised or deleted as inconsistent with OMB Circulars A-21 and A-110.

Discussion: The OMB circulars that serve as cost principles or administrative guidance for grant recipients all contain the requirement that only allowable costs may be charged to a Federal grant as either direct or indirect costs. The same principle applies to funds used for matching or cost-sharing. However, the re-statement of this principle in these regulations has caused some confusion, particularly since a change to OMB Circular A-110, recently adopted by the Department as 34 CFR Part 74, gives granting agencies the option of approving unrecovered indirect costs to satisfy matching or cost-sharing requirements. The Department has therefore decided to delete the proposed § 75.564(e) from the final regulations.

As discussed elsewhere in this document, the Department is continuing its practice of prohibiting the use of unrecovered indirect costs to satisfy matching or cost-sharing requirements under training and restricted rate grants. For grantees subject to 34 CFR Part 74, the Department will consider on a case-by-case basis requests to use unrecovered indirect costs as matching or cost-sharing when the grant in question is not a training grant or a grant subject to a restricted indirect cost rate.

Changes: The proposed § 75.564(e) has been deleted.

Comments: The Department received one comment that § 75.564(f) should be deleted and each member of a group of eligible parties be allowed to apply its own indirect cost rate to its portion of the grant funds.

Discussion: It has been the Department's policy on certain indirect cost matters-for example, the eight percent training rate-to maximize the Federal funds going to support program activities. If the official recipient of the grant applies its rate to the full award amount and each member of the group applies its full rate to its portion of the grant, as has happened in such situations, a disproportionate amount of the grant is spent on indirect costs. Since the Department wishes to maximize the funds supporting the direct costs of a project, it is limiting the indirect costs for grants made to groups of eligible parties to the rate of the official grant recipient, the fiscal agent for the group. The members of the group can decide among themselves how the funds should be divided within the group.

Changes: No change was made to the text of this paragraph, but, since the proposed § 75.564(e) has been deleted, this paragraph has been redesignated as § 75.564(e) in these final regulations.

Section 76.560 General indirect cost rates; exceptions.

Since the Department recently adopted the revised OMB Circular A-110 as 34 CFR Part 74, references in this section have been revised to be consistent with the new 34 CFR Part 74.

Section 76.561 Approval of indirect cost rates.

The Department has revised this section to be consistent with the corresponding section of 34 CFR Part 75 so that State educational agencies may approve multi-year indirect cost rates for recipients subject to 34 CFR Part 76.

Section 76.564 Restricted indirect cost rate-formula.

The Department has made a revision to this section to make its requirements consistent with similar requirements in 34 CFR Part 75. Specifically, § 76.564(d) has been revised to prohibit the use of unrecovered indirect costs under a restricted rate grant to satisfy matching or cost-sharing requirements. This change is consistent with current departmental practices and with the restriction placed on training grants in § 75.562(c)(3).

Section 76.565 General management costs-restricted rate.

Comments: Several commenters found the language in § 76.565 concerning organization-wide activities to be unclear. Some of the commenters thought that the proposed regulations did not make it clear that some activities considered divisional administration may in fact be organization-wide activities, such as payroll or personnel functions.

Discussion: The Department agrees with these commenters and has changed the wording in an attempt to make the final version clearer to readers.

Changes: The wording of § 76.565(a) has been changed to clarify the meaning of the term organization-wide. Section 76.565(c) has been revised to clarify the use of the term divisional administration.

Comments: One commenter said a deputy chief executive officer who oversees general management activities should not be excluded as required in § 76.565 (c) and (d). Another said that chief executive officers should be excluded only if their activities are limited to one component.

Discussion: Chief executive officers and their deputies are positions that would exist whether or not the organization received Federal funds. To support them with Federal funds would be supplanting, which is prohibited under restricted rate programs.

Changes: None.

Comments: One commenter disagreed with the definition of component in § 76.565(d)(2), saying it conflicts with the generally accepted accounting standard that an agency is a component of a State. The commenter maintains that the proposed definition of a component as an organizational unit within an agency would prohibit States from charging legitimate administrative costs to a grant.

Discussion: As stated in § 76.563, this section applies to "agencies of State and local governments," most commonly the State educational agency, not to the State itself. In this context, the component would be an organizational unit within a State agency, as described in the regulation. No change has been made in this section.

Changes: None.

Section 76.567 Other expenditures-restricted rate.

Comments: The Department received one comment that subgrants should be excluded from other expenditures, since their inclusion would distort the indirect cost calculation and subgrants are already excluded from the base in the formula in § 76.569.

Discussion: The Department agrees with this comment and has made a change.

Changes: Section 76.567(b) has been revised to exclude subgrants from other expenditures.

Section 76.568 Occupancy and space maintenance costs-restricted rate.

Comments: One commenter thought the last two sentences of § 76.568(c) should be deleted as inconsistent with other Federal guidance in OMB Circular A-87 and OASC-10, that States cannot afford to pay for the office space occupied by Federal program staff.

Discussion: The sentences in question are not intended to indicate that the costs of office space for Federal program staff must be borne by the States, nor are they inconsistent with other Federal guidance. Costs of space can be charged as indirect or direct costs as appropriate, but Federal funds cannot be used to supplant local funds under programs with statutory prohibitions of supplanting. The last sentence merely reiterates the standard practice that the Secretary approves the budgets of projects supported by grant funds. No changes have been made to this section.

Changes: None.

Paperwork Reduction Act of 1980

These regulations have been examined under the Paperwork Reduction Act of 1980 and have been found to contain no information collection requirements.

Assessment of Educational Impact

In the notice of proposed rulemaking, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed rules and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects 34 CFR Part 75

Education Department, Grant programs-education, Grant administration, Incorporation by reference.

List of Subjects in 34 CFR Part 76

Education Department, Grant programs-education, Grant administration, Intergovernmental relations, State-administered programs.

(Catalog of Federal Domestic Assistance Number does not apply.)

Dated: November 10, 1994.

Richard W. Riley,
Secretary of Education.

The Secretary amends Parts 75 and 76 of Title 34 of the Code of Federal Regulations as follows:

PART 75-DIRECT GRANT PROGRAMS

1. The authority citation for Part 75 continues to read as follows:

Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, unless otherwise noted.

2. Section 75.129 is amended by revising paragraphs (a) (1) and (2) and adding paragraph (a)(3), to read as follows:

§ 75.129 Legal responsibilities of each member of the group.

(a) * * *

(1) The use of all grant funds;

(2) Ensuring that the project is carried out by the group in accordance with Federal requirements; and

(3) Ensuring that indirect cost funds are determined as required under § 75.564(e).

* * * * *

3. Section 75.560 is amended by revising paragraphs (a) (1), (2), (3), (4), and (5), by revising paragraph (b), by adding new paragraphs (c) and (d), by and revising the authority citation at the end of the section, to read as follows:

§ 75.560 General indirect cost rates; exceptions.

(a) * * *

(1) Institutions of higher education, at 34 CFR 74.27;

(2) Hospitals, at 34 CFR 74.27;

(3) Other nonprofit organizations, at 34 CFR 74.27;

(4) Commercial (for-profit) organizations, at 34 CFR 74.27; and

(5) State and local governments and federally-recognized Indian tribal organizations, at 34 CFR 80.22.

(b) A grantee must have a current indirect cost rate agreement to charge indirect costs to a grant. To obtain an indirect cost rate, a grantee must submit an indirect cost proposal to its cognizant agency and negotiate an indirect cost rate agreement.

(c) The Secretary may establish a temporary indirect cost rate for a grantee that does not have an indirect cost rate agreement with its cognizant agency.

(d) The Secretary accepts an indirect cost rate negotiated by a grantee's cognizant agency, but may establish a restricted indirect cost rate for a grantee to satisfy the statutory requirements of certain programs administered by the Department.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

4. Section 75.561 is revised to read as follows:

§ 75.561 Approval of indirect cost rates.

(a) If the Department of Education is the cognizant agency, the Secretary approves an indirect cost rate for a grantee other than a local educational agency. For the purposes of this section, the term local educational agency does not include a State agency.

(b) Each State educational agency, on the basis of a plan approved by the Secretary, shall approve an indirect cost rate for each local educational agency that requests it to do so. These rates may be for periods longer than a year if rates are sufficiently stable to justify a longer period.

(c) The Secretary generally approves indirect cost rate agreements annually. Indirect cost rate agreements may be approved for periods longer than a year if the Secretary determines that rates will be sufficiently stable to justify a longer rate period.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

5. Section 75.562 is revised to read as follows:

§ 75.562 Indirect cost rates for educational training projects.

(a) Educational training grants provide funding for training or other educational services. Examples of the work supported by training grants are summer institutes, training programs for selected participants, the introduction of new or expanded courses, and similar instructional undertakings that are separately budgeted and accounted for by the sponsoring institution. These grants do not usually support activities involving research, development, and dissemination of new educational materials and methods. Training grants largely implement previously developed materials and methods and require no significant adaptation of techniques or instructional services to fit different circumstances.

(b) The Secretary uses the definition in paragraph (a) to determine which grants are educational training grants.

(c) Indirect cost reimbursement on a training grant is limited to the recipient's actual indirect costs, as determined by its negotiated indirect cost rate agreement, or eight percent of a modified total direct cost base, whichever amount is less. For the purposes of this section, a modified total direct cost base is defined as total direct costs less stipends, tuition and related fees, and capital expenditures of $5,000 or more.

(1) The eight percent limit also applies to cost-type contracts under grants, if these contracts are for training as defined in this section.

(2) The eight percent limit does not apply to agencies of State or local governments, including federally recognized Indian tribal governments, as defined in 34 CFR 80.3.

(3) Indirect costs in excess of the eight percent limit may not be charged directly, used to satisfy matching or cost-sharing requirements, or charged to another Federal award.

(d) A grantee using the training rate of eight percent is required to have documentation available for audit that shows that its negotiated indirect cost rate is at least eight percent.
(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

6. Section 75.563 is revised to read as follows:

§ 75.563 Restricted indirect cost rate-programs covered.

If a grantee decides to charge indirect costs to a program that has a statutory requirement prohibiting the use of Federal funds to supplant non-Federal funds, the grantee shall use a restricted indirect cost rate computed under 34 CFR 76.564 through 76.569.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

7. Sections 75.564 through 75.568 are removed.

8. A new § 75.564 is added to read as follows:

§ 75.564 Reimbursement of indirect costs.

(a) Reimbursement of indirect costs is subject to the availability of funds and statutory or administrative restrictions.

(b) The application of the rates and the determination of the direct cost base by a grantee must be in accordance with the indirect cost rate agreement approved by the grantee's cognizant agency.

(c) Indirect cost reimbursement is not allowable under grants for-

(1) Fellowships and similar awards if Federal financing is exclusively in the form of fixed amounts such as scholarships, stipend allowances, or the tuition and fees of an institution;

(2) Construction grants;

(3) Grants to individuals;

(4) Grants to organizations located outside the territorial limits of the United States;

(5) Grants to Federal organizations; and

(6) Grants made exclusively to support conferences.

(d) Indirect cost reimbursement on grants received under programs with statutory restrictions or other limitations on indirect costs must be made in accordance with the restrictions in 34 CFR 76.564 through 76.569.

(e) Indirect costs for a group of eligible parties (see §§ 75.127-75.129) are limited to the amount derived by applying the rate of the applicant, or a restricted rate when applicable, to the grant in keeping with the terms of the applicant's indirect cost rate agreement.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474)

PART 76-STATE-ADMINISTERED PROGRAMS

9. The authority citation for Part 76 continues to read as follows:

Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474, unless otherwise noted.

10. Section 76.560 is amended by revising paragraphs (a)(1), (2), (3), (4), and (5), by revising paragraph (b), by adding new paragraphs (c) and (d), and revising the authority citation at the end of the section, to read as follows:

§ 76.560 General indirect cost rates; exceptions.

(a) * * *

(1) Institutions of higher education, at 34 CFR 74.27;

(2) Hospitals, at 34 CFR 74.27;

(3) Other nonprofit organizations, at 34 CFR 74.27;

(4) Commercial (for-profit) organizations, at 34 CFR 74.27; and

(5) State and local governments and federally-recognized Indian tribal organizations, at 34 CFR 80.22.

(b) A grantee must have a current indirect cost rate agreement to charge indirect costs to a grant. To obtain an indirect cost rate, a grantee must submit an indirect cost proposal to its cognizant agency and negotiate an indirect cost rate agreement.

(c) The Secretary may establish a temporary indirect cost rate for a grantee that does not have an indirect cost rate agreement with its cognizant agency.

(d) The Secretary accepts an indirect cost rate negotiated by a grantee's cognizant agency, but may establish a restricted indirect cost rate for a grantee to satisfy the statutory requirements of certain programs administered by the Department.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474)

11. Section 76.561 is revised to read as follows:

§ 76.561 Approval of indirect cost rates.

(a) If the Department of Education is the cognizant agency, the Secretary approves an indirect cost rate for a State agency and for a subgrantee other than a local educational agency. For the purposes of this section, the term local educational agency does not include a State agency.

(b) Each State educational agency, on the basis of a plan approved by the Secretary, shall approve an indirect cost rate for each local educational agency that requests it to do so. These rates may be for periods longer than a year if rates are sufficiently stable to justify a longer period.

(c) The Secretary generally approves indirect cost rate agreements annually. Indirect cost rate agreements may be approved for periods longer than a year if the Secretary determines that rates will be sufficiently stable to justify a longer rate period.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2381(a), and 3474)

12. Section 76.563 is revised to read as follows:

§ 76.563 Restricted indirect cost rate-programs covered.

Sections 76.564 through 76.569 apply to agencies of State and local governments that are grantees under programs with a statutory requirement prohibiting the use of Federal funds to supplant non-Federal funds, and to their subgrantees under these programs.

(Authority: 20 U.S.C. 1221e(a)(1), 2831(a), 2974(b), and 3474)

13. A new § 76.564 is added to read as follows:

§ 76.564 Restricted indirect cost rate-formula.

(a) An indirect cost rate for a grant covered by § 76.563 or 34 CFR 75.563 is determined by the following formula:

Restricted indirect cost rate = (General management costs + Fixed costs) ÷ (Other expenditures)

(b) General management costs, fixed costs, and other expenditures must be determined under §§ 76.565 through 76.567.

(c) Under the programs covered by § 76.563, a subgrantee of an agency of a State or a local government (as those terms are defined in 34 CFR 80.3) or a grantee subject to 34 CFR 75.563 that is not a State or local government agency may use-

(1) An indirect cost rate computed under paragraph (a) of this section; or

(2) An indirect cost rate of eight percent unless the Secretary determines that the subgrantee or grantee would have a lower rate under paragraph (a) of this section.

(d) Indirect costs that are unrecovered as a result of these restrictions may not be charged directly, used to satisfy matching or cost-sharing requirements, or charged to another Federal award.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474)

14. A new § 76.565 is added to read as follows:

§ 76.565 General management costs-restricted rate.

(a) As used in § 76.564, general management costs means the costs of activities that are for the direction and control of the grantee's affairs that are organization-wide. An activity is not organization-wide if it is limited to one activity, one component of the grantee, one subject, one phase of operations, or other single responsibility.

(b) General management costs include the costs of performing a service function, such as accounting, payroll preparation, or personnel management, that is normally at the grantee's level even if the function is physically located elsewhere for convenience or better management. The term also includes certain occupancy and space maintenance costs as determined under § 76.568.

(c) The term does not include expenditures for-

(1) Divisional administration that is limited to one component of the grantee;

(2) The governing body of the grantee;

(3) Compensation of the chief executive officer of the grantee;

(4) Compensation of the chief executive officer of any component of the grantee; and

(5) Operation of the immediate offices of these officers.

(d) For purposes of this section-

(1) The chief executive officer of the grantee is the individual who is the head of the executive office of the grantee and exercises overall responsibility for the operation and management of the organization. The chief executive officer's immediate office includes any deputy chief executive officer or similar officer along with immediate support staff of these individuals. The term does not include the governing body of the grantee, such as a board or a similar elected or appointed governing body; and

(2) Components of the grantee are those organizational units supervised directly or indirectly by the chief executive officer. These organizational units generally exist one management level below the executive office of the grantee. The term does not include the office of the chief executive officer or a deputy chief executive officer or similar position.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474)

15. A new § 76.566 is added to read as follows:

§ 76.566 Fixed costs-restricted rate.

As used in § 76.564, fixed costs means contributions of the grantee to fringe benefits and similar costs, but only those associated with salaries and wages that are charged as indirect costs, including-

(a) Retirement, including State, county, or local retirement funds, Social Security, and pension payments;

(b) Unemployment compensation payments; and

(c) Property, employee, health, and liability insurance.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474)

16. A new § 76.567 is added to read as follows:

§ 76.567 Other expenditures-restricted rate.

(a) As used in § 76.564, other expenditures means the grantee's total expenditures for its federally- and non-federally-funded activities in the most recent year for which data are available. The term also includes direct occupancy and space maintenance costs as determined under § 76.568 and costs related to the chief executive officers of the grantee and components of the grantee and their offices (see § 76.565(c) and (d)).

(b) The term does not include-

(1) General management costs determined under § 76.565;

(2) Fixed costs determined under § 76.566;

(3) Subgrants;

(4) Capital outlay;

(5) Debt service;

(6) Fines and penalties;

(7) Contingencies; and

(8) Election expenses. However, the term does include election expenses that result from elections required by an applicable Federal statute.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474)

17. A new § 76.568 is added to read as follows:

§ 76.568 Occupancy and space maintenance costs-restricted rate.

(a) As used in the calculation of a restricted indirect cost rate, occupancy and space maintenance costs means such costs as-

(1) Building costs whether owned or rented;

(2) Janitorial services and supplies;

(3) Building, grounds, and parking lot maintenance;

(4) Guard services;

(5) Light, heat, and power;

(6) Depreciation, use allowances, and amortization; and

(7) All other related space costs.

(b) Occupancy and space maintenance costs associated with organization-wide service functions (accounting, payroll, personnel) may be included as general management costs if a space allocation or use study supports the allocation.

(c) Occupancy and space maintenance costs associated with functions that are not organization-wide must be included with other expenditures in the indirect cost formula. These costs may be charged directly to affected programs only to the extent that statutory supplanting prohibitions are not violated. This reimbursement must be approved in advance by the Secretary.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474)

18. A new § 76.569 is added to read as follows:

§ 76.569 Using the restricted indirect cost rate.

(a) Under the programs referenced in § 76.563, the maximum amount of indirect costs under a grant is determined by the following formula:

> Indirect costs=(Restricted indirect cost rate)x(Total direct costs of the grant minus capital outlays, subgrants, and other distorting or unallowable items as specified in the grantee's indirect cost rate agreement)

(b) If a grantee uses a restricted indirect cost rate, the general management and fixed costs covered by that rate must be excluded by the grantee from the direct costs it charges to the grant.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474)

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AFTERWORD

We hope that you have found the information in this book to be helpful. We welcome your comments and suggestions for improvements to future editions. Please send them to:

Director
Grants Division, GCS
U.S. Department of Education
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